IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.
FILED
OCT 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1510

JACK M. WEATHERFORD, Individually and in his official capacity as an agent of the South Carolina Law Enforcement Division; PETE STROM, individually and in his official capacity as Chief of the South Carolina State Law Enforcement Division; and other unknown agents and officials of the South Carolina State Law Enforcement Division,

Petitioners,

v.

BRETT ALLEN BURSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether respondent was denied effective assistance of counsel and a fair state court trial where a paid informer posing as a co-defendant infiltrated the defense camp, affirmatively misled respondent and his counsel as to his true identity and the nature of

the state's case, participated in attorney-client discussions and discovered the entire defense strategy, collaborated with the prosecution, subsequently testified against the respondent at the state trial, and where respondent was demonstrably prejudiced by the deceptive practices?

II. Whether the chief of the South Carolina State Law Enforcement Division is liable for violations of respondent's right to counsel and fair trial where his own decisions directly caused the deprivations?

STATEMENT

Respondent, Brett Allen Bursey, brought this action for damages under 42 U.S.C. §1983 against petitioners Pete Strom, Chief of the South Carolina Law Enforcement Division (hereinafter "SLED"), and Jack M. Weatherford, a paid informer for SLED. Bursey contended that Weatherford penetrated his defense camp when he was being prosecuted in state court for malicious destruction to real and personal property and deprived him of the effective assistance of counsel, a fair trial, privacy and freedom from unlawful governmental intrusion in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. A. 3-6. Petitioners moved for summary judgment which was denied. A. 9-20. The case was subsequently heard on the merits by the court sitting without a jury. The district court dismissed the complaint on August 20, 1974, A. 245-55, and an appeal was taken to the United States Court of Appeals for the Fourth Circuit. The circuit court reversed and remanded for further proceedings after concluding that

Weatherford and Strom's conduct had violated Bursey's constitutional rights to the effective assistance of counsel and a fair trial. A. 256-64. Petitioners' motion for rehearing and rehearing en banc was denied. A. 265-74. A petition for writ of certiorari to review the decision of the circuit court was filed in this Court and was granted on June 21, 1976, ____ U.S. ____, 44 L.W. 3610, 3738.

Weatherford's Assignment

Weatherford was hired by Strom in August, 1969, as an undercover agent for SLED. His principal assignment was to infiltrate the University of South Carolina and keep Strom informed about what was happening on the campus.

> A. [Strom] During that time, we had a lot of problems at the University of South Carolina, as well as other places, and it was necessary for me to have certain information as to what was happening on the campus or what was going to happen. . . .
>
> Q. Was Mr. Weatherford in a favorable position to serve in a capacity of an under-cover agent?
>
> A. He was . . . because he was a student and he knew people and he was smart, and he knew how to do things and how to get information and to evaluate it.
>
> A. 101-02.

Weatherford was at that time Strom's sole undercover agent at the University, A. 118, and his job "entailed [surveilling and reporting] anything that may create a police problem or a problem for the orderly operation of the University of South Carolina." A. 102. Strom

didn't "point . . . out" Bursey to Weatherford, but he did discuss him with his agent and assumed that Bursey would be surveilled "because he admits he was the organizer." A. 214. Bursey's attorney was told by a SLED agent following the state trial that Weatherford's assignment was actually "to attend the University of South Carolina in an effort to get something on Brett Bursey." A. 92. SLED's specific interest in Bursey was admitted by another agent, Lt. Ronald Cook, who investigated and surveilled Bursey as a routine matter prior to his arrest because he was connected with "radical activities" and was "known to be involved in different incidents." A. 147-48.

Weatherford Makes Contact With Bursey.

As part of his SLED assignment, Weatherford met Bursey who was then a student at the University and joined a University chartered discussion group known as AWARE. A. 235. The two later served as co-chairpersons of AWARE, A. 168-235, and according to Bursey, became close friends. "I considered Jack a close friend, one of a handful of people that I related with socially and politically and saw him quite often—three, sometimes five times a week." A. 24.

Both Strom and Weatherford were deposed prior to trial in federal court and both testified at trial. Weatherford also testified at Bursey's state court trial. The inconsistencies in testimony, particularly Weatherford's regarding his association with Bursey, AWARE and his entire role of informer at the University, were often marked. Strom, for example, consistently maintained that Weatherford had been hired to do undercover work

at the University of South Carolina. Weatherford, however, repeatedly denied at the federal trial that Strom "ever mentioned the University in particular. At least, I don't recall it." A. 161.

> Q. Were you given an assignment by Mr. Strom to infiltrate the University and find out what was going on there?
>
> A. No sir, I was never given an assignment to infiltrate anything.
>
> Q. Were you given an assignment by Mr. Strom to keep your eyes open, to see what was happening at the University of South Carolina?
>
> A. I don't believe he ever mentioned the University in particular. At least, I don't recall it.
>
> * * * * *
>
> Q. I want to ask you again whether or not Mr. Strom ever instructed you to find out what was happening at the University of South Carolina and in particular to find out what was going on with the so-called AWARE group?
>
> A. To the best of my recollection, I don't recall him ever focusing my attention either on AWARE or on the University in particular, to infiltrate or –
>
> A. 160-61.

But Weatherford's prior testimony at the state trial was flatly contradictory. "I made my affiliation with these [AWARE] people because I was a SLED agent. I knew none of them prior to being a SLED agent. I was hired as a SLED agent, and I went out to the UFO, and there I met Mr. Bursey, and I met others in this group, and during this past year I have spent a lot of time with them." A. 235. His later testimony on re-direct in the state court was to the same effect.

Q. Counsel asked you about belonging to these subversive groups like "Aware" and all. Who told you to get into those groups?

A. I went into those groups under instructions of Mr. Strom.

Q. Mr. Strom?

A. Yes, sir.

Q. And in your instructions, were you just to follow what the other people told you to do?

A. Primarily, and report back to Mr. Strom what was going on.

A. 240.

Weatherford also denied at the federal trial and in his deposition that he had established a personal friendship with any of the members of the AWARE group.

Q. Did you form friendships or acquaintanceships with many or most of the other members of AWARE?

A. I certainly was acquainted with most of them.

Q. Did you form friendships with any of them?

A. That would be hard to answer. In the sense that often times I was concerned about them as people, then you might say yes; but in the sense that we were great social and personal friends, then probably the answer would be no.

Deposition of Jack McIver Weatherford, at 43.

As far as Bursey was concerned, had Weatherford "not been working for SLED, [Bursey] would not have been a person with whom I would have chosen to associate." *Ibid.*, at 61; "he seemed somewhat abhorrent to me." *Ibid.*, at 109. Also see A. 190. But Weatherford's testimony in state court was decidedly different:

Q. Mr. Weatherford, you have known Mr. Bursey how long?

A. Since September, of last year.

Q. You have cultivated a good friendship with him?

A. Yes, sir. . . .

Q. You have a lot of friends in this movement, so to speak, do you not?

A. Yes, sir.

A. 234-35.

Weatherford in fact established such close personal ties with Bursey and his circle of friends that he eventually married the roommate of Bursey's wife to whom he had been introduced by Bursey while a SLED agent. A. 43-4, 154.

The Draft Board Incident.

As a result of their stated, mutual opposition to the war in Vietnam, Weatherford and Bursey and several others met on March 19, 1970, and planned a demonstration at the Richland County Selective Service Board to celebrate National Anti-Draft Week. Bursey suggested that they perform "a theatre skit, going into the Draft Board in the daytime and tacking up a notice on the door, condemning it as a health hazard." A. 25, 237. Also see State Trial Transcript, at 112-14. The group decided, however, that later that night they would go to the draft board, paint anti-war symbols on the building and throw a bottle of paint and a brick with an anti-war note tied to it through a window. A. 25-6, 230-34. Weatherford made no attempt to stop the demonstration but was a willing participant in both its planning and execution. *Ibid.* Strom was given advance notice of the plan by Weatherford, but like him he made no attempt to stop it, reasoning thusly:

Q. Now, when you first came into possession of knowledge or information that there was going to be a demonstration there, did you instruct Mr. Weatherford that he ought to attempt to stop it?

A. No, sir.

Q. Can you tell me why you did not do that?

A. Well, if I get information a man is going to rob a safe, if I would instruct him to stop it, I mean, we never would have a violation and all the thieves and crooks would be going wild; so you catch them and take them into the courtroom.

A. 120.

Weatherford, Bursey and Greg Merrick carried out the defacing of the local board in the early A.M. hours of March 20, 1970. A fourth person, Dan Bolding, drove the getaway car. Both Bursey and Weatherford painted a peace symbol on a wall and each threw a brick. SLED and other agents were actually in the Selective Service building at the time, but the plotters came and went undetected. Weatherford promptly called SLED and made arrangements for his and Bursey's arrest. A. 26-9, 220, 226-34, 240-42.

The Co-Defendant Deception.

SLED agents arrested Bursey and Weatherford during the day on March 20, 1970, as they were attending a Student Affairs Committee meeting at the University. They were handcuffed together and taken to the Richland County Sheriff's office. A. 29-30, 173, 242. According to the solicitor, warrants were "issued that day for malicious mischief (sic) to personal property

and malicious mischief (sic) to real property; it later went to the grand jury; and both of them were indicted." A. 129, 140. The two were also charged with criminal conspiracy. State Trial Transcript, at 31. Bursey was charged with illegal possession of a teargas machine, an aerosal device purchased in a local drug store which he had in his pocket at the time of his arrest. A. 30-1, 201.

Bursey remained in jail for approximately 12 days due to difficulties in raising his $12,500 bond. A. 31. Weatherford was released to fellow agents within hours of his arrest and taken out of town for several days. A. 174. In the meantime, Bursey, who was still in custody, was told by SLED agents that Weatherford was also in jail. A. 31-2. Following Bursey's release he and Weatherford met at the home of a mutual friend, also active in the AWARE group, and Weatherford confirmed his fellow agent's misrepresentations to Bursey that he had been in jail for several days before making bail. A. 32-3, 174-75.

To maintain the ruse that Weatherford was a bona fide co-defendant, following Weatherford's release from jail the solicitor made arrangements for a local Columbia lawyer, Frank Taylor, to appear to represent Weatherford. Solicitor Foard testified, "I told Mr. Taylor that—we discussed the facts, as I recall, I told him I didn't want anybody, including people in his office, to know that this man was an undercover agent, and that I would have him [Weatherford] to get in touch with him." A. 129-30. Weatherford made an appointment with Taylor.

A. We talked for ten or fifteen minutes, and he said he knew about the case, and that there was no need to discuss it. He just wanted to see

what I looked like and find out a little bit about me, so he would recognize me if he saw me again, and that was the extent of our conversation.

Q. Did you get the impression that Mr. Taylor knew or felt at that time that his representation of you was purely technical?

A. Yes, sir.

A. 155.

"He just wanted to know what I looked like so that he would know who he was supposed to be representing, and that was the primary function of the meeting." A. 244.[1]

Another reason for retaining Taylor was to have someone with whom Bursey's attorney, Rauch Wise, could confer concerning Bursey and his co-defendant Weatherford's defenses. Weatherford thought that the ACLU had "involvement in the case," A. 244, apparently because Wise was a member of the Board of Directors of the ACLU of South Carolina, a fact Weatherford could have learned from his then fiancee and future wife, who was also a member of the Board of Directors of the ACLU of South Carolina. A. 81. Weatherford needed a lawyer, he reasoned, "so that if the ACLU wanted to contact somebody as my lawyer, then they would have a lawyer to contact instead of them trying to take and represent my case." A. 244. Wise was, however, privately retained. A. 34.

[1] Taylor testified that he had talked with the solicitor, knew that Weatherford worked for SLED, agreed to "represent" him, accepted and expected no fee and knew little about the case except that "it had to do with red paint and a brick through the glass." A. 135-39. He talked with Weatherford on only one occasion but did not undertake to do anything on his behalf in preparation for a trial. A. 137, 139.

Weatherford duly told Bursey that Taylor was his attorney and the information was passed on to Wise. A. 32-3, 83, 173. Wise made an appointment with Taylor to discuss their clients' cases. "The conversation might have lasted five or ten minutes. The sum and substance of it was, I think we both agreed there was an informant, and he had no more idea who the informant was than I did ... And he also mentioned that he would file a motion for severance, due to the fact that he didn't want his client tried with my client, due to what he considered the adverse reputation of my client, would work to the prejudice of his client." A. 84, 137.[2] Wise was completely deceived by Taylor's purported representation of Weatherford and assumed that Weatherford was being routinely represented as a co-defendant in an actual criminal case. A. 85.

Wise requested a preliminary hearing for his client which was held on April 13, 1970. A. 201. At the hearing, the assistant solicitor was careful to preserve the fiction that Weatherford was an actual defendant.

Mr. Monteith: And the second [warrant] is *The State v. Brett Allen Bursey and Jack M. Weatherford*.... As I understand it counsel here, his clients are not present, but he would like to read into the record—oh, Mr. Bursey has come in, let the record show then that Brett Allen Bursey is present. Do you represent Jack Weatherford?

Mr. Wise: No, sir.

Mr. Monteith: Then this is a Preliminary Hearing on Brett Allen Bursey alone. Is that correct?

The Court: Yes, that's right.

[2] Taylor, "made sort of a joke out of [his representation of a co-defendant of Bursey's]" in discussing the matter with a colleague. A. 136.

Mr. Wise: I'm sorry?

Mr. Monteith: You represent Bursey only and not Weatherford?

Mr. Wise: That's right.

Mr. Monteith: Do you want to state for the record the fact that you represent him, and just that you represent Bursey?

A. 201-02.

Weatherford was not called as a witness at the preliminary hearing.

Intrusion Upon the Right to Counsel.

Following Bursey and Weatherford's arrests, Weatherford continued to work as an undercover agent at the University. As Strom explained it, "we had other problems at the university, and I discussed it with the solicitor, and we thought it was a good idea to keep him under cover, you know, for a while longer, to see what other things he could come up with, so we could maintain order on the campus." A. 105. Weatherford's original instructions were not modified in any way but remained fully in force.

Q. Did you give him any additional or different instructions after March 19th, 1970?

* * * * *

A. No, not that I remember.

* * * * *

Q. And you didn't modify your instructions to Mr. Weatherford in any way following the arrest?

A. No, sir.

Q. And as his boss you perceived that he would function in the same way as he had before?

A. As far as I knew, he could, yes.

Q. So I mean you didn't try to hire any other agents to do some of the things that he had been doing?

A. No, sir.

Q. He was still your man at the University and you felt he could function that way?

A. Yes, sir.

A. 222-23.

As part of his continuing role of undercover agent at the University, Weatherford helped "trash" the Administration Building in protest over the Kent State killings and the escalation of the war in Vietnam. A. 44. He applied for membership in the Venceremos Brigade "in order to find out–generally, those people appeared to be more radical, say, than a lot of other radicals, and I thought it worthwhile at least to find out what was going on." A. 176. He counseled with his co-defendant and advised him to jump bail and flee the jurisdiction. A. 42. He also continued to investigate Bursey for SLED.

In an affidavit in support of his motion for summary judgment, Weatherford conceded that at the time of Bursey's trial and "for some time before such date he was engaged in investigating certain activities of Brett Allen Bursey, and that at the trial of Bursey on such date he did testify against Bursey in a prosecution for malicious destruction of real property." A. 11. In a separate affidavit Strom confirmed Weatherford's continuing investigation of Bursey following the arrest by SLED: "Before, during and after the trial of Brett Allen Bursey for the crime of malicious destruction of real property . . . that one Jack M. Weatherford was at such times an undercover agent of SLED; and that the defendant had general knowledge that Weatherford was

engaged in investigating the activities of Brett Allen Bursey." A. 10.

As a result of his continuing investigation of Bursey, his status as a co-defendant and his "friendship" for Bursey, Weatherford met Bursey and Wise on several occasions prior to Bursey's trial. On at least two of these occasions, the co-defendants' trials were discussed in detail. A. 34-5, 65-7, 79-82. The first meeting was arranged by Bursey and took place at his home in mid-April shortly after his release from jail. The lawyer and the co-defendants discussed the pending cases generally and whether or not there might be an informer, Weatherford's representation and his plans to seek a severance. A. 35-7, 65-7, 79-82. Bursey was suspicious because the arrests occurred so soon after the demonstration. Weatherford agreed that an informer could be involved and expressed the opinion that perhaps Merrick was an agent since he had never been arrested and charged. *Ibid.*[3] During the discussions Weatherford made every effort to maintain the fiction that he was a co-defendant. *Ibid.* The three also discussed whether or not Weatherford might be approached by law enforcement officers to secure testimony against Bursey in exchange for leniency for Weatherford's brother who was at that time serving a sentence for burglary.[4] "Jack categorically denied that

[3]Solicitor Foard indicated that Merrick was indeed an informer. "There were some more or less informers involved. I'm not sure even who they worked for; for example, there was one [Merrick] who—when the case was called for trial—was out of the country. I don't know whether he ever worked for SLED or not.... I'm not sure who he was an informer for.... There were informers working for the FBI; informers working for this agency; and I'm not sure that I know who was who." A. 133-34.

[4]Weatherford's brother was indeed much upon Weatherford's mind at that time. Taylor recalled that during his one conversation with Weatherford "the impression I had from talking to him mainly was that he was interested in me helping him get his brother's time reduced." A. 136.

he had been approached and asserted that he would not cooperate with law enforcement agencies, and I felt Jack to be very sincere in that." A. 36, 55. The three also discussed trial tactics, including the testimony Merrick might give and the testimony the state would have available if Merrick did not testify. A. 36-7.

After the April meeting and prior to Bursey's trial Weatherford went to Hilton Head Island, South Carolina, for a weekend vacation with fellow SLED agents. While there, he thought he might have been seen by a friend of Bursey's. To preserve the co-defendant deception, Weatherford got in touch with Bursey upon his return to the University. He lied to him. He told Bursey that his benefactor, A Dr. Hardwick, the man whom he said had posted his bond and retained his lawyer, had insisted that he discuss his case with the police. Weatherford told Bursey "that Dr. Hardwick said, 'It's the least you can do, Jack, is to go down and talk with them,' and Dr. Hardwick arranged a meeting with law enforcement officers . . . with Jack at Hilton Head. Jack came to me and volunteered this information. He said that "I went to Hilton Head; I met with Sonny Clark; they wanted me to turn state's evidence; they offered me a deal,' is what it amounted to, 'and I rejected it' . . . the thing I specifically recall, of course, is his assurance that he would not cooperate with them." A. 54-5, 74-5, 179.

The seond, formal attorney-client meeting in which Weatherford participated took place at the home of Weatherford's fiancee shortly before Bursey's trial. The matters discussed at the first meeting were discussed again, as well as legal strategies and tactics which had been developed during the interim. A. 37-40, 81-3. According to Bursey, "Mr. Weatherford was totally in

our confidence. We had no restraints about discussing the case with him. We assumed that he was a co-defendant and that he shared some liability in the matter." A. 38-9. Wise and Bursey were informed that Merrick was out of the country and would not be present as a witness at the trial. The discussion therefore turned to whom the witnesses might be against Bursey. Weatherford again denied that he would testify against Bursey or be a witness for the state. A. 82. He also agreed not to be present in the courtroom on the day of Bursey's trial. A. 39, 71, 82, 184. Bursey and Weatherford had discussed the possibility of Weatherford's being subpoenaed but concluded that in such instance he would have available the Fifth Amendment privilege against self-incrimination. A. 76, 82-3. Final defense strategy was also discussed at the meeting, that in Merrick's absence and the absence of testimony from Weatherford, the State would not be able to prove by direct testimony that Bursey was present at the local board, and "there would be a fighting chance with the jury under those circumstances." A. 82. It was also determined that Bursey would not testify since "I could add nothing and would open the cross-examination field for a whole range of things that might be prejudicial in the eyes of the jury." A. 39.

The State Trial.

Prior to the trial of Bursey's criminal case in state court, Wise filed a motion with Judge John Grimble for discovery of the identity of informants. Judge Grimble disqualified himself and the motion was renewed prior to trial before Judge Badger Baker. The motion was denied. A. 85.

When Bursey's case was called for trial in the state court, the prosecution's first witness was Weatherford. He implicated Bursey fully and directly in the crime charged. A. 225-34. Weatherford's testimony and his disclosure as an informer altered dramatically the defense tactics. It was determined that Bursey would have to testify. A. 86. Bursey, however, in reliance upon Weatherford's promised silence was not prepared for direct and cross-examination. A. 39-40, 86.

As for Lawyer Wise, the revelation of Weatherford's identity "completely changed the complexion of the case in a matter of a few minutes. It—needless to say—disoriented me to some extent to realize that . . . this person who I thought I had known turns out to be an undercover SLED agent. It was disarming, to say the least." A. 88. It impaired his ability to conduct the defense and cross-examine Weatherford. A. 88-9. The defense was also denied the opportunity to do a background check on Weatherford because of his repeated representations that he would not be a witness. *Ibid.* Wise believes that Weatherford was subject to impeachment. Following the trial he learned that Weatherford had been arrested on a narcotics charge earlier in 1969. A. 89-90. Wise's understanding was that the charges were dismissed in consideration of Weatherford's doing undercover work for SLED. *Ibid.*

By being deceived about the strength of the state's case, Wise made no serious effort at plea bargaining prior to trial. A. 40-1, 90. Following Weatherford's testimony, however, a short recess was taken and Wise discussed the possibility of entering a plea with the trial judge. The judge indicated that if a plea of guilty was entered to both counts Bursey would be sentenced to

one year on each count to run consecutively for a total of two years. The state's position during plea bargaining was that Bursey should be sentenced to confinement. A. 87-90. Wise concluded that his plea bargaining position was diminished after the trial had started and rejected the proffered sentence. *Ibid.* Bursey was convicted by the jury of malicious destruction to real property and sentenced by the judge to eighteen months of imprisonment. A. 257. None of his co-conspirators were ever brought to trial.

Both Strom and Weatherford denied that they passed any information to the prosecution about Bursey's defense strategy. At the federal trial Strom at first denied that he had *any* contact whatsoever with Weatherford following Bursey's arrest. A. 116. He modified his testimony, however, when confronted with his prior deposition testimony, A. 121-22, and admitted that Weatherford "made some phone calls' I'm not sure how many after that [arrest]." A. 222.

Weatherford conceded that during the entire time he was an agent he was in constant contact with Strom and SLED, on the telephone, when he came to Strom's office at SLED headquarters every other week to pick up his pay check, A. 163 and Deposition of Jack McIver Weatherford, at 22-3, 69, and that he had been giving Strom reports for "approximately a year." A. 240. But like Strom his memory as to post-arrest contact with SLED concerning Bursey had considerably dimmed by the time this case was heard in the district court. Weatherford denied or couldn't recall "any further contact" with SLED "with regard to this matter . . . until the time of the trial," A. 155, 158, 165-66. He denied discussing the Hilton Head deception with Strom. A. 166-67.

Weatherford's memory proved unreliable at the federal trial as to other matters. He didn't, for example, remember defacing the draft board. "Mr. Bursey said I wrote the word 'Peace' and I possibly did, if he said that, but I actually do not recall having done it." A. 168-69, Cf. Weatherford's state court testimony, A. 231-32, 236. He couldn't remember the names of people who planned or executed the draft board demonstration, A. 169-70, and he couldn't recall who Merrick was. A. 170. "I didn't know the other people involved in the incident at the time, so, I assume that that is the name of the person who was with us; but at the time, I don't believe I ever knew his name—I mean, I could have, perhaps, but, if so, I had only met those other people within the two days of the incident; and I don't think I ever saw any of them again after the incident; so I'm not too positive on the names." A. 170. At the state trial, however, Weatherford was very positive on names. "Well, we parked on Senate Street, and Mr. Bursey, and Mr. Merrick and myself got out, and Mr. Bolder stayed inside the car." A. 231.

At the federal trial Weatherford remembered almost nothing of the meetings or conversations with Wise and Bursey.

> Q. All right, sir, now, you have heard testimony, have you not, from Mr. Wise and Mr. Bursey about certain meetings they say they had with you. I just want to make clear now, you do recall the last meeting or the one before trial, the one involving rain and the box of carry-out fried chicken. You recall that?
>
> A. I recall the testimony, yes, sir, but I don't recall the incident.
>
> Q. You don't recall such a meeting at all?
>
> A. No, sir. I recall the testimony yesterday.

Q. Your testimony is that you don't remember that you actually were there under those circumstances?

A. Yes, sir, that's correct.

Q. And your testimony also is you have no recollection of any meeting shortly after Mr. Bursey's release—and I believe it was in the second or third week of April of 1970—you have no recollection meeting with Mr. Bursey and Mr. Wise?

A. No, sir.

A. 181-82.

Weatherford later admitted that he had seen Bursey and Wise together, but still insisted that he remembered almost nothing about their conversations. A. 182-84.

There was one thing which Weatherford remembered clearly when he testified at the federal trial. "I definitely wouldn't have [discussed Bursey's case] with the solicitor." A. 158. Weatherford did, however, as the court of appeals noted, talk with the solicitor who prosecuted the case prior to trial, A. 261, 133, 191-94, and he testified against Bursey.

Bursey moved for production of Weatherford's reports, telephone logs, etc. but learned that undercover agents were not required to keep records and that the only records in Weatherford or SLED's possession pertaining to Weatherford (or Bursey) were Weatherford's pay vouchers. A. 115, 186.[5]

[5] From August, 1969, through September, 1970, when he left SLED, Weatherford was paid $100 a week for a total of $5,300. A. 103.

Weatherford's Need for Cover.

Strom said that Weatherford's cover wasn't needed for anything he was working on at the University following Bursey's arrest, A. 125, nor was it needed for any other SLED assignment he might be given.

Q. Mr. Strom, were you concerned that Mr. Weatherford maintain his cover following Mr. Bursey's arrest?

A. I wasn't concerned, because everybody doing undercover work, occasionally, somebody is going to find out about it and make him—know who they are; no great concern.

Q. It wouldn't have damaged your factfinding mission to have Mr. Weatherford's cover blown?

A. I didn't give it any thought really. Often a man breaks a pretty good-sized case . . . everybody involved, they are going to get together, and they are going to figure out as best they can what happened. They know something has happened or they wouldn't have got caught; so, I figure on a pretty good-sized case, an undercoverman, his identity is going to be known anyway.

* * * * *

A. I really didn't put much emphasis on how effective he could be after this anyway.

Q. After the arrest?

A. Yes, sir.

Q. So, you had no reason to want to see his cover remain? Is that it?

A. I wasn't going to announce it in the newspaper, but I wasn't going to be in shock if it—if they made him.

A. 124-25.

The Court then asked Strom if there was "anything particular that Weatherford was working on . . . at the

University, where you had to keep his cover for a month, six weeks, two months?" Strom answered: "No, sir." A. 125.

Weatherford was not afraid for his personal safety after he testified against Bursey and declined Strom's offer of protection. A. 107. He felt that he was valuable to SLED even after the trial and that "in due time, had I stayed, I could have been just as effective in most any capacity out there." A. 180. He turned down, however, an offer to be an "above-the-ground sort of agent" for SLED and decided to attend graduate school instead. A. 180, 189.

The Prosecution's Witness.

Weatherford knew from the date of Bursey's arrest that he might be a witness against Bursey. "From the time of the incident, it was always a possibility and, as I said, I don't remember any particular point at which a decision was made. I was supposed to be in the courtroom that day if needed and I was there." Deposition of Jack McIver Weatherford, at 112. Also see A. 176. Before testifying, Weatherford was told "to speak loudly" and "to be polite and straight forward with any answers" during cross-examination. Deposition of Jack McIver Weatherford, at 121.

Strom understood that "at some point in time on all your big cases . . . you have to let them testify, and then you give them a regular job and give them another assignment." A. 123. When the solicitor decided before trial that he wanted to use Weatherford as a witness, he asked Strom if he objected. Strom didn't. A. 105.

Strom, by his own admission, has had extensive law enforcement training. He is a graduate of the FBI National Academy. A. 110. "I have been to schools in Washington . . . had the best instructors in the country, and I know a man's rights–at least I think I do;" A. 109. Strom was familiar with the Sixth Amendment right to counsel and knew that law enforcement agents could not constitutionally have access to defense counsels. *Ibid.*

Although Strom knew that Weatherford "might" be a witness and that he was continuing his investigation of Bursey, he indicated that had he "known" Weatherford would be a witness he would have taken him off Bursey's case. "I wouldn't have had him to meet with them." A. 107. The reason for removing him would have been to protect Bursey's Sixth Amendment right to counsel. A. 109. Strom, moreover, conceded that what had actually happened in the case was unconstitutional.

Q. Had somebody reported to you that one of your agents was participating in defense consultations, would you permit that sort of thing?

A. No, sir.

Q. Why would you not?

A. Because it wouldn't be ethical; wouldn't be legal.

Q. Do you think that would be a violation of the Sixth Amendment right to confer–

A. As far as I know–

Ibid.

The Court Below.

The district court dismissed Bursey's §1983 complaint for the reasons that he had not shown that Weatherford actually communicated defense tactics to the prosecutor, A. 249, and that there was no constitutional requirement that an undercover agent disclose his identity and "avoid all contacts with an accused and his attorney prior to trial." A. 254. As to Strom, the court held that even conceding a violation by Weatherford of "some constitutional right of Bursey . . . there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford." A. 255.

The court of appeals in a unanimous opinion reversed. It held that Weatherford, who was fully acquainted with Bursey's trial strategy, conferred with the prosecutor prior to trial and testified against Bursey, was a member of the prosecution, and that his intrusion into the attorney-client relationship

> was not inadvertent but was knowingly permitted by the prosecution. That the instrusion was not for the purpose of attaining information but was to maintain Weatherford's cover is, we think, of no consequence. We conclude whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial. . . . In the context of a civil suit, our holding that Bursey's Sixth Amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense.
>
> A. 260-61.

The court of appeals also held that Bursey's right to a fair trial had been violated by the concealment of

Weatherford's identity, his denials that he would be a witness against Bursey, together with the "devastating effect" of his actual testimony. A. 261-62. As to Strom, the court found that his "own decisions directly caused the violation of Bursey's constitutional rights," in that "(1) he participated in the decision to maintain Weatherford's cover; (2) he entrusted the details of perfecting the cover to Solicitor Foard . . . and (3) that he concurred personally in the decision to allow Weatherford to testify." A. 262. The court of appeals reversed and remanded the case for determination if Strom and Weatherford were entitled to the benefit of a "*Strickland*- type good faith defense." A. 264.

SUMMARY OF ARGUMENT

This case involves whether the prosecution may deliberately and systematically misrepresent to a defendant after arrest and prior to trial, the evidence it will present, and as a direct result of its deceits, intrude upon attorney-client counsels, discover the complete defense strategy, manufacture surprise and disarray the defendant's presentation at trial.

The Sixth Amendment guarantee of the right to counsel is fundamental. *Gideon v. Wainwright*, 327 U.S. 335 (1963). To insure that the right is effective and that trials are not mere window dressing, the right to counsel applies at critical pre-trial stages when consultation and thorough going investigation and preparation are vitally important. During this period a defendant is entitled to be free of indirect and surreptitious intrusions upon the right to counsel of the sort which occurred in this case. *Massiah v. United States*, 377 U.S. 201 (1964).

If the prosecution is allowed to intrude upon the confidential attorney-client relationship, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. *Fisher v. United States*, ____ U.S. ____, 96 S.Ct. 1569, 1577 (1976). Clients would be reluctant to confide in their attorneys because of fear that the government might intercept evidence or based upon the interceptions, indict for additional crimes. In addition, the government might discover the strategy of the defense thereby securing subtle but real benefits from knowing the planned procedure or even the state of mind of the defendant and his counsel with respect to the trial. Defendants who are thus reluctant to discuss their cases with their attorneys will not receive informed legal advice or the effective assistance of counsel guaranteed by the Sixth Amendment. In such cases, all defendants, the guilty as well as the innocent, will be unable to establish their defenses. As a result, the adversary system would be reduced from a fact finding process designed to separate the guilty from the innocent to a meaningless ritual to facilitate the confiction and incarceration of persons charged with crimes. Moreover, if the government is permitted promiscuously to intercept attorney-client communications increased violations will occur and the fact finding process will become less and less reliable, leading to disrespect for law enforcement and disregard for the Constitution. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

To safeguard the protection of the Sixth Amendment this Court has held that intrusions into defense counsels invalidate the trials at which they occur and that proof of disclosure or other prejudice is not required as a condition for relief. *Black v. United States*, 385 U.S. 26

(1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *O'Brien v. United States*, 386 U.S. 345 (1967). Public policy requires that where the government is the law breaker and creates a great potential for harm that it bear the consequences of its misconduct. Proof of knowledge or use by the prosecution of intercepts is generally impossible to adduce since offending officials cannot be expected to confess their guilt. Moreover, proof or prejudice in the use of intercepts is in most cases unascertainable. To insure that the protection of the Constitution is not nullified, fairness requires that defendants not be given impossible burdens of proof. The rule which does not require a defendant to show prejudice from invasion of the right to counsel is supported by other decisions of this court. See, *Peters v. Kiff*, 407 U.S. 493 (1972), concluding that a white defendant has standing to complain of exclusion of blacks from his jury; *Tumey v. Ohio*, 273 U.S. 510 (1972), holding that it is inherently prejudicial to allow a judge to sit in judgment of cases in which he has a financial interest; and *Estes v. Texas*, 381 U.S. 532 (1965), finding unconstitutional a televised trial, even though the specific mischief and prejudice could not be shown with particularity. Like the right to a fair and impartial judge and jury, the right to counsel is too fundamental to allow courts to indulge in speculation as to the degree of prejudice flowing from its denial. *Glasser v. United States*, 315 U.S. 60 (1942); *Hamilton v. Alabama*, 368 U.S. 52 (1961).

Although it is not necessary for Bursey to show that intercepts were disclosed to the prosecution or that prejudice resulted to his defense from their use, there was knowledge by the prosecution of attorney-client communications in this case and there was prejudice to

the defense. Here, the prosecution resorted to an elaborate scheme of ruses and deceptions involving a sham defendant, phoney lawyer, continuing investigation, and deliberate misrepresentations, to secure access to Bursey's defense counsels, discover his trial strategy and affirmatively misrepresent to him and his lawyer the evidence the state would present. As the court of appeals found, Weatherford was a member of the prosecution. In gaining access to defense counsels, the prosecution gained an unconstitutional adversarial advantage insuring that Bursey was deprived of an opportunity meaningfully to prepare his case, explore plea bargaining or otherwise to enjoy the benefits of counsel at trial.

This case does not depend upon a breach of the common law attorney-client privilege for relief. The scope of the Sixth Amendment right to counsel involved here and the common law attorney-client privilege are not co-equal. One is a broad constitutional concept, the other only a rule of evidence. In any case, Weatherford's conduct did violate the confidential nature of attorney-client communications. As *Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964), and *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965), establish, communications between lawyers and co-defendants are within the evidentiary privilege.

Whether the government must open its files to a defendant or disclose the identity of informants prior to trial is not an issue here. This case involves whether the state may manufacture surprise by deliberately misrepresenting to a defendant the case it will present against him. To allow the state to do so would undermine the process of presenting and evaluating evidence thereby making the criminal justice system less reliable,

and disserve the ends of justice by depriving defendants of the opportunity intelligently to plea bargain. *Williams v. Florida*, 399 U.S. 78, 106 (1970).

The prosecution has a duty to deal fairly with persons charged with crime. That duty has included the obligation not to offer, or refuse to correct, perjured testimony or suppress material exculpatory evidence. *Brady v. Maryland*, 373 U.S. 93 (1963), *Alcorta v. Texas*, 355 U.S. 28 (1957). Unfairness has also been found to result where the prosecution failed to disclose the identity of informers whose testimony was relevant and might be helpful to the accused, *Roviaro v. United States*, 353 U.S. 53 (1957), and where procedures are used which provide an opportunity for prosecutorial vindictiveness by allowing the indictment of defendants for more serious offenses where they prosecute de novo appeals. *Blackledge v. Perry*, 417 U.S. 21 (1974). The prosecution dealt unfairly with Bursey here and the state's conduct is below acceptable constitutional levels.

There was no legitimate need for maintenance of Weatherford's cover. He never made a single arrest as a SLED agent, he testified at only one trial–Bursey's, and he could not recall a single case in which his activities led to a conviction. Although his value as a law enforcement agent was minimal, the record discloses that he vandalized the Administration Building at the University of South Carolina, he participated in destruction to the Selective Service building and he went to Georgia to investigate "radicals." Strom stated that following Weatherford and Bursey's arrest Weatherford was not working on "anything particular" where he needed to maintain his cover. A. 125. Strom also said that he was not concerned about Weatherford's cover after the arrest and doubted his continued effectiveness as an undercover agent. There is also no evidence to show that

Weatherford's life was in danger. Weatherford was offered protection by Strom after Bursey's trial but declined it. A. 107.

Even if maintenance of the undercover agent's secrecy was a legitimate law enforcement need, that need cannot outweigh a defendant's right to assistance of counsel and a fair trial. *Roviaro v. United States, supra*. The state may protect its legitimate interests in confidentiality in ways which do not involve disclosure or denying persons accused of crimes the protection of the Constitution. In this case, of course, it was the state which revealed the informer's identity at trial.

Strom's decisions directly caused the denial to Bursey of the effective assistance of counsel and a fair trial. Strom participated in the decision to maintain Weatherford's cover, intrusted the details of perfecting the cover to Solicitor Foard and concurred in the decision to allow Weatherford to testify. It is impossible to conclude that Strom should not reasonably have known that defense contact would occur. *Wood v. Strickland*, 420 U.S. 308 (1975). The court of appeals correctly held that Strom's personal involvement in the violations of Bursey's rights was satisfied by the decisions and actions which he undertook. Viewed against the principle of tort liability that a person is responsible for the natural consequences of his actions, *Monroe v. Pape*, 365 U.S. 167 (1961), Strom is answerable for the injury done to Bursey.

ARGUMENT

This case does not involve the "mere presence" or non-prejudicial, inadvertent intrusion of an undercover agent in attorney-client discussions, nor does it involve

whether the prosecution must affirmatively disclose the names of witnesses and informants to the defense. The issue which this case involves is whether the prosecution may deliberately, systematically and gratuitously lie to a defendant about the evidence the state will present, and as a direct result of its deceit, intrude upon attorney-client counsels, discover the complete defense strategy and totally disarray the defendant's presentation at trial. The court of appeals properly held that it could not.

I.

A STATE COURT DEFENDANT IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE A PAID INFORMER POSING AS A CO-DEFENDANT GAINS ACCESS TO AND INFILTRATES THE DEFENSE CAMP, AFFIRMATIVELY MISLEADS THE DEFENDANT AND HIS COUNSEL AS TO HIS TRUE IDENTITY AND THE NATURE OF THE STATE'S CASE, PARTICIPATES IN ATTORNEY-CLIENT DISCUSSIONS AND DISCOVERS THE ENTIRE DEFENSE STRATEGY, COLLABORATES WITH THE PROSECUTION, SUBSEQUENTLY TESTIFIES AGAINST THE DEFENDANT AT THE STATE TRIAL, AND WHERE THE DEFENDANT IS DEMONSTRABLY PREJUDICED BY THE DECEIT.

A. The Sixth Amendment protects the attorney-client relationship from governmental intrusion during critical pre-trial stages.

The right to counsel guaranteed by the Sixth Amendment is "fundamental and essential to a fair trial," and

extends to both serious and "petty" state criminal prosecutions through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). To ensure that the right is effective and not merely theoretical, this Court has held that an accused must be given reasonable time to secure counsel, *Powell v. Alabama*, 287 U.S. 45, 71 (1932); of his or her own choice, *Ibid.* at 53; who has no conflict of interest but is loyal, *Glasser v. United States*, 315 U.S. 60, 76 (1942); that indigent defendants are entitled to the appointment of counsel in all cases which could result in imprisonment, *Argersinger v. Hamlin, supra*; and, that sufficient opportunity must be afforded for consultation, preparation, *Reynolds v. Cochran*, 365 U.S. 525, 531 (1961), and to prepare a defense, *Avery v. Alabama*, 308 U.S. 444, 446 (1940). The decisions of this Court have not given the Sixth Amendment "a narrowly literalistic construction," but have understood it "to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments". *Herring v. New York*, 422 U.S. 853 (1975), 95 S.Ct. 2550, 2553. Also see, *Ferguson v. Georgia*, 365 U.S. 570 (1961), and *Brooks v. Tennessee*, 406 U.S. 605 (1972).

The right to counsel commences at any official interrogation of the accused, before or after indictment, *Escobedo v. Illinois*, 378 U.S. 478 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966), or at any critical stage of the proceedings, *United States v. Wade*, 388 U.S. 218 (1967), *Coleman v. Alabama*, 399 U.S. 1 (1970), for the right to counsel at trial would be "a very

hollow thing" if effective representation could be subverted during pre-trial stages when legal aid and advice are critical. *In re Groban*, 352 U.S. 330, 344 (1957) (Black, J., dissenting). "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial'." *Escobedo v. Illinois, supra*, 378 U.S. at 488[6] quoting from *Ex parte Sullivan*, 107 F.Supp. 514, 517-18 (D. Utah, 1952).

This Court has characterized the time after which a defendant is charged until the beginning of trial, the time during which the intrusions involved in this case were made, as "perhaps the most critical period of the proceedings . . . when consultation, thorough-going investigation and preparation [are] vitally important," *Powell v. Alabama, supra*, 287 U.S. at 57, and has held that during this period a defendant is entitled to be free of indirect and surreptitious intrusions upon the right to counsel. *Massiah v. United States*, 377 U.S. 201, 205-07 (1964). This is so because effective pre-trial preparation depends upon total disclosure between lawyer and client which in turn depends upon the integrity and security of attorney-client communications. *Black v. United States*, 385 U.S. 26 (1966); *O'Brien v. United States*, 386 U.S. 345 (1967); *Hoffa v.*

[6] As noted in *Escobedo, supra*, 378 U.S. at 488, n.9, the Soviet criminal code, admittedly no model for a constitutional democracy, allows denial of counsel during the investigation.

United States, 385 U.S. 293 (1966).[7] Also see, *Hickman v. Taylor*, 329 U.S. 495, 510 (1947):

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.[8]

and *United States v. Nobles*, 422 U.S. 225, 238 (1975).

B. Substantial private and public interests depend upon the integrity of the attorney-client relationship.

The interests served by protecting attorney-client discussions from governmental intrusion are those of individual defendants and society at large. If the prosecution is allowed to intrude upon attorney-client communications one obvious result will be that "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal

[7] In its brief in *Hoffa*, the government conceded the precise point.

> [W]e believe . . . the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding. Brief, at 71.

[8] In addition to the Sixth Amendment's protection of attorney-client confidences, this Court has acknowledged the common law privilege involving disclosures made by a client to an attorney in order to obtain legal assistance. *Fisher v. United States*, ____ U.S. ____, 96 S.Ct. 1569, 1577 (1976). Also see the discussion, *infra*, at 67-10.

advice." *Fisher v. United States*, ____ U.S. ____ (1976), 96 S.Ct. 1569, 1577. Clients would be reluctant to confide in their attorneys for a number of reasons. They might not wish to implicate others in crimes, or publish embarrassing information about themselves. The government might discover through interception important evidence which it could use to convict the defendant or indict for other crimes. Or, as in this case, the prosecution might discover the strategy of the defense—who its witnesses will be, their order of call, their testimony, or indeed if the defense will call any witnesses at all, and as a result whether the prosecution will have final summation before the jury;[9] whether the defendant will testify and if so his weaknesses or strengths or fears as a witness and his vulnerability to impeachment; strategems of the defense to blunt the prosecutions' case; defense strategy for preservation of the record for use on appeal; and the style, strength and weaknesses of the attorney for the accused—to name but a handful of the hundreds of factors that constitute the defense of a criminal case. In our adversary system such matters are crucial. See, *e.g. Brooks v. Tennessee*, 406 U.S. 605, 612 (1972): "Whether the defendant is to testify is an important tactical decision

[9] In South Carolina, a defendant is permitted to have final argument before judgment in the event that he introduces no evidence during trial. *State v. Gellis*, 158 S.C. 471, 155 S.E. 8[illegible] (1930). The Court recognized the value of making final argument in *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 2555 (1975): "In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."

as well as a matter of constitutional right."[10] The prosecution's knowledge of defense strategy can be as harmful to the defendant as its knowledge of directly incriminating evidence.[11]

If the government is permitted to intercept attorney-client disclosures, a defendant will, for the reasons stated above, be reluctant to discuss his case with his attorney. But without such discussion, counsel will be unable to perform the traditional role of planning and preparing the defense, *Geders v. United States*, ___ U.S. ___ (1976), 44 L.W. 4420, *Brooks v. Tennessee*, *supra*, examining witnesses, *Faretta v. California*, 422 U.S. 806 (1975), presenting evidence and making arguments, *Ferguson v. Georgia*, 365 U.S. 570 (1961), *Herring v. New York*, 422 U.S. 853 (1975), 95 S.Ct. 2550, and perfecting any possible appeal, *Douglas v. California*, 372 U.S. 353 (1963), *Anders v. California*, 386 U.S. 738 (1967). Under the circumstances, a defendant will not receive informed legal advice or the effective assistance of counsel guaranteed by the Sixth

[10]The government acknowledged this fact in its brief in *Hoffa*: "the vice in having a government informant in the defense camp during a trial is that he may overhear and transmit privileged communications–i.e., conversations between a defendant and his attorney or other expressions of defense strategy." Brief, at 103.

[11]See ***Taglianetti v. United States***, 398 F.2d 558, 570 (1st Cir. 1968), ***affirmed on other grounds***, 394 U.S. 316 (1969), where the Court took note of the "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial*, quite apart from hearing affirmative evidence, or leads to evidence." (emphasis in original).

Amendment.[12] A defendant with ineffective counsel is essentially no better off than one without any counsel, for in either case, "though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).[13]

The defendant who is inhibited from making disclosures to his attorney of matters involving his defense because of fear of interception by the government, severely hampers his defense. But the defendant who *does* make disclosures which are intercepted is doubly disadvantaged. Not only is his defense deprived of its full effectiveness, but the government's position in the trial is enormously enhanced. The adversary system, upon which the administration of our criminal laws depend, would be reduced from a fact finding process designed to separate the innocent from the guilty, *Herring v. New York*, *supra*, 95 S.Ct. at 2555, *United States v. Nobles*, 422 U.S. 225, 238 (1975), to a meaningless ritual to facilitate the conviction and incarceration of persons charged with crimes. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

[12]The American Bar Association's Code of Professional Responsibility, EC 4-1 & n.2 (1971), recognizes the importance of full disclosure in the preparation and presentation of an adequate criminal defense.

[13]The protection of the Sixth Amendment, of course, extends to all defendants, those who might be found guilty as well as those found innocent. "Time out of mind this Court has reversed convictions for the most heinous offenses, even though no doubt about the guilt of the defendants was entertained. It reversed because the mode by which guilt was established disregarded those standards of procedure which are so precious and so important for our society." ***Sacher v. United States***, 343 U.S. 1, 28 (1952) (Frankfurter, J., dissenting).

Governmental intrusion upon attorney-client communications offends other public and social interests distinct from those of defendants in individual cases. If the government is permitted to intercept communications in derrogation of the right to effective assistance of counsel, continued and increased violations will be encouraged—and will occur.[14] A system of criminal law enforcement which thus depends upon intrusions upon the right to counsel will become less reliable and more prone to abuses than a system which depends upon extrinsic evidence gathered through acceptable law enforcement techniques. *Escobedo v. Illinois, supra*, 378 U.S. at 488-89. Disrespect for law enforcement and disregard for the Constitution will follow. As Mr. Justice Brandeis said in his dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

[14] Judge Washington of the District of Columbia Circuit opined in *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953), that the unlawful use of government agents to participate in defense counsels was "no doubt extremely rare." However, the increasing number of lower court cases involving the promiscuous use of informers to intercept attorney-client communications suggests that the practice is now becoming wide spread. See, *infra*, at 57-61, and Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book III, pp. 225-270, and Book II, pp. 67-82.

C. Decisions of this Court have uniformly held that governmental intrusion into defense counsels invalidates the trial at which it occurs, and that proof of disclosure or other prejudice is not required.

The impropriety of governmental intrusions upon attorney-client communications has never been questioned by this or any lower court, although lower courts have often disagreed on the definition and consequences of intrusion. During 1966 and 1967 this Court decided four cases involving interception of attorney-client communications: *Black v. United States*, 385 U.S. 26 (1966) (per curiam); *Hoffa v. United States*, 385 U.S. 293 (1966); *Schipani v. United States*, 385 U.S. 372 (1966) (per curiam); and *O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam). In each of the per curiam cases the Court ordered new trials for the defendants upon a showing that law enforcement agents by the use of electronic surveillance had intercepted attorney-client conversations. Significantly, none of the defendants were required to show that the intercepted information had been disclosed to the prosecution or establish other prejudice to their defense.

In *Black*, FBI agents overheard conversations between the defendant and his lawyer by way of an electronic listening device which had been installed for a purpose unrelated to Black's tax prosecution. On appeal of the case, the Solicitor General advised the Court that prosecuting attorneys had been in possession of logs of the monitored conversations but were unaware at the time of trial that they included attorney-client matters. Moreover, the Solicitor General advised that prosecuting attorneys "found nothing in the F.B.I. reports or

memoranda which they considered relevant to the tax evasion case." 385 U.S. at 28. The Court, however, set the conviction aside and ordered a new trial to "permit the removal of any doubt as to Black's receiving a fair trial." *Ibid.*, at 29. Justices Harlan and Stewart dissented on the grounds that the defendant's remedy should be remand for a prejudice hearing rather than reversal. Nonetheless, in *O'Brien*, decided later in the same term, the Court followed its rule of automatic reversal set out in *Black*. In *O'Brien*, the FBI tapped the telephone of one of O'Brien's business associates. O'Brien used the phone on two occasions. On the first, he discussed his forthcoming trial with someone. On the second, he asked his lawyer to file an application relating to the territorial conditions of his release on bail. A log of the conversations was made but was never given or communicated to attorneys for the Department of Justice who were prosecuting the case. The Court summarily vacated the conviction, citing *Black*, and remanded the case for a new trial. Justices Harlan and Stewart again dissented, noting that in *Schipani*, "the Court properly vacated the conviction because the Solicitor General conceded that evidence used at trial was tainted." 386 U.S. at 347.

In *Hoffa v. United States*, decided after *Black*, but before *Schipani* and *O'Brien*, the Court indicated that interception of attorney-client communications by an informant was as unconstitutional as interception by electronic surveillance. Hoffa, at his trial for Taft-Hartley Act violations (Test Fleet trial), attempted to bribe jurors. An associate in whom he confided during the trial, Edward Partin, was a government informer. Partin reported the jury tampering attempts to the prosecution as well as other matters relating to the Test

Fleet case defense strategy, i.e., a group of prospective character witnesses were being instructed about their testimony by Hoffa's lawyers. The Test Fleet trial ended in a hung jury but Hoffa and others were later convicted, based upon Partin's testimony, for trying corruptly to influence jurors in violation of 18 U.S.C. §1503. The Court affirmed the jury tampering conviction and found no Sixth Amendment violation because the statements overheard and transmitted by the informer to the prosecution concerning the jury tampering, as opposed to the defense strategy in the Test Fleet case, were not "made in the presence of counsel, in the hearing of counsel, or in connection in any way with the legitimate defense of the Test Fleet prosecution. The petitioner's statements related to the commission of a quite separate offense—attempted bribery of jurors—and the statements were made to Partin out of the presence of any lawyer." 385 U.S. at 308. The Court assumed, however, but without deciding, that had Hoffa been convicted at the Test Fleet trial, "the conviction would presumptively have been set aside as constitutionally defective. Cf. *Black v. United States*," 385 U.S. at 307, because of Partin's intrusion upon the confidential relationship between the defendant and his counsel. In short, even though interception of the attorney-client discussions would invalidate the trial at which it occurred, as far as the jury tampering trial was concerned, no attorney-client relationship existed or was penetrated at the time Partin made the interception.[15]

[15]The opinions on denial of certiorari in *Granello v. United States*, 386 U.S. 1019 (1967), indicate that this interpretation of *Hoffa* is correct. *Granello* involved surveillance of the defendant which had no connection with his present case. The dissenters, nonetheless, felt that the lack of connection should be further "exposed in the record of this case so that we may, at least, be sure that the Government's trepassory surveillance has not infected the trial of these petitioners." 386 U.S. 1021.

The cases just discussed establish that intrusion by a government agent into the legal camp of the defense deprives the defendant of the Sixth Amendment right to counsel, and that proof of disclosure to the prosecution or other prejudice is not required. That this reading of the cases is correct is enforced by the reliance in *Hoffa* upon two cases from the Court of Appeals for the District of Columbia Circuit, *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953), and *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1952), and the Court's assumption that the two cases were "rightly decided." 385 U.S. at 307. In *Coplon*, the court of appeals reversed the denial of a motion for new trial and directed that the defendant be given the opportunity to prove her allegation that conversations between her and her attorney before and during her trial had been electronically overheard by FBI agents. Such eavesdropping, if shown, was held to be a violation of the Fifth and Sixth Amendments, and defendant was entitled to a new trial at which she could be free of surreptitious interception of communications with her attorney and enjoy the right of the effective assistance of counsel. 191 F.2d at 760. The court catalogued state and federal cases which "unequivocally establish" that an accused is denied the effective aid of counsel if he or she is denied the right of confidential consultation, and concluded that "[t]he prosecution is not entitled to have a representative present to hear the conversations of accused and counsel." 191 F.2d at 749. The court of appeals also rejected the contention that Coplon was entitled to relief only if she could prove that the interception yielded evidence which was

introduced against her.[16] Quoting the language from *Glasser v. United States*, 315 U.S. 60, 76 (1942) that:

> [t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial,

the circuit court held that

> the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred . . . regardless of whether prejudice was shown to have resulted from the denial. 191 F.2d at 759.

Caldwell v. United States, similarly reversed a conviction where an informer had intruded upon attorney-client consultations. Caldwell was accused of attempted tampering with a jury in a criminal trial of another person. The prosecution hired an undercover agent, Bradley, to ascertain who might have assisted Caldwell in the alleged offense. Bradley became acquainted with Caldwell and his attorney, and was eventually solicited to work for the defense. Bradley reported this to the prosecution and was instructed not to work for nor take money from the defense. Subsequently, Bradley reported to the prosecution that the defense had offered to pay him large sums to steal the prosecution's file on Caldwell. As a result, the prosecution caused Bradley to extend his activities with a view toward convicting persons associated with the conspiracy to steal the files. He thereafter gained full access to defense planning and reported to the prosecution both on

[16]The trial judge in denying the motion for a new trial found that "there was no such evidence suggested, and counsel does not point out a line, or even a scintilla of testimony procured in this way." 191 F.2d at 759.

the current charge and the alleged plot to steal the files. He did so through the trial and Caldwell was convicted. Six days later, Caldwell filed a motion for a new trial on the grounds that he had just discovered Bradley's double dealing. The motion was denied. In *Caldwell*, as in this case, the government disputed that Bradley actually interfered with or prejudiced the defense. Nonetheless, the court of appeals reversed noting that Bradley, even though he had been solicited to work for the defense, had intruded "upon conferences, supposedly open only to the most loyal, between accused *and his counsel*," and that Caldwell need not show actual prejudice in order to receive a new trial. 205 F.2d at 881, n. 10 (emphasis in original). Caldwell's conviction was reversed and the case remanded for a new trial.

> We recognize that the prosecutor in this case was faced with a real dilemma, once the possibility of a theft of the files had been reported by Bradley. We do not question that he then acted with what must have seemed high motives, and certainly with active diligence. But high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel. The Constitution's prohibitions against unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand.
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> 205 F.2d at 881.

Not only did this Court assume in *Hoffa* that *Coplon* and *Caldwell* had been correctly decided but the government in its brief in *Hoffa* repeatedly approved both circuit court opinions. "Specifically, we do not challenge the holding or underlying principles of the decisions on which petitioners rely most heavily—*Caldwell v. United States*, 205 F.2d 879 (C.A.D.C.), and *Coplon v. United States*, 191 F.2d 749 (C.A.D.C.), certiorari denied, 342 U.S. 926." (Brief, at 71.)[17]

D. The conduct of the state here was more irresponsible, flagrant and prejudicial than that condemned by this court in prior cases.

Unless the principals set out in *Black, O'Brien, Hoffa, Coplon* and *Caldwell* are to be abandoned by this Court, the opinion of the court of appeals that Bursey was denied the assistance of counsel in violation of the Sixth Amendment must be affirmed. Weatherford, upon instructions from prosecutor Foard and Strom, as part of a continuing investigation of Bursey, through an elaborate scheme of misrepresentations, distortions, falsifications and out-right lies, e.g., the Hilton Head episode, convinced Bursey and his attorney that he was a co-defendant and friend of the defense. As a natural consequence of the government's deception, Weatherford discovered the entire defense strategy prior to trial. At the same time, he repeatedly denied that he would be a witness at trial, thereby deceiving the defense

[17] In its amicus brief filed in this case, the government has apparently changed its position. Although it does not argue that *Coplon* and *Caldwell* were wrongly decided, it does argue that this Court should not adopt a "prophylactic rule" involving intrusions into defense counsels.

about the evidence the state would present and the nature of its case. In doing so, he insured that Bursey would be surprised at trial and deprived him of the opportunity to prepare a defense for the case that was actually presented.

The facts here are more egregious than those of any of the cases decided or relied upon by this Court in resolving similar Sixth Amendment violation claims. In none of the earlier cases was there affirmative misrepresentation by the prosecution about the nature of the government's case. Here, as the court of appeals found, Weatherford repeatedly denied, to Bursey and to Bursey's lawyer, that he would be a witness "up through the day before his appearance at trial." A. 262. He also denied that he would even be present in court when Bursey was tried.

In both *Black* and *O'Brien* the interception of attorney-client conversations was accidentally procured through investigations of matters unrelated to the defendants' pending trials. The interceptions were also made by persons who were not members of the prosecution or working on its behalf. Here, the investigation of Bursey was a continuing one; undertaken by a person who was actually a member of the prosecution;[18] one of the *stated* purposes of the government's deceit which caused the intrusion was to have someone present with whom Bursey's lawyer could discuss Bursey and Weatherford's cases; and, the

[18]The court of appeals found that "the record establishes that Weatherford, fully acquainted with Bursey's trial strategy, talked with Solicitor Foard, who prosecuted the case, before trial and, of course, testified against Bursey. On these facts we find him to have been a member of the prosecution." A. 261.

"someone" was lawyer Taylor—yet another member of the prosecution team.

In *Black* and *O'Brien*, it does not appear that either prosecuting attorneys or members of the prosecution team involved in the pending cases had knowledge at the time of trial of the substance of intercepted attorney-client communications. Here, Weatherford, a member of the prosecution, intercepted and had knowledge of Bursey's defense and attorney-client confidencies. Thus, even if disclosure or knowledge by the prosecution of attorney-client communications is regarded as a condition for a Sixth Amendment violation, *Black* and *O'Brien* notwithstanding, such knowledge by Weatherford, a member of the prosecution, would satisfy the condition.[19]

Even were Weatherford regarded merely as a police officer, and not technically a "member" of the prosecution, his knowledge of defense counsels should be imputed to the prosecution. Such a rule has been formulated by this Court and consistently followed by lower courts in implementing *Brady v. Maryland*, 373 U.S. 83 (1963), so that the suppression of favorable evidence by the police and other agents is attributable to the prosecutor. In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the failure to disclose a promise made to a witness by a lawyer in the United States Attorney's office not to prosecute in exchange for testimony against Giglio was imputed to the prosecutor.

[19]The prosecution's knowledge of attorney-client communications would be only one way in which a defendant might be prejudiced. Prejudice would flow, as in this case, from misrepresentation by an informer of the evidence the state will present, the creation of surprise and denial of the opportunity to prepare for trial.

"The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."[20] A contrary rule would discourage communications between the prosecutor, the police and other government agencies and result in the decline of efficient law enforcement.

E. Strong public policy requires that the Government bear the consequences of its misconduct and that persons accused of crime not be deprived of protection against intrusions upon the Sixth Amendment right to counsel.

The rule that interception of attorney-client communications by the state invalidates the trial at which it

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[20] And see, *Moore v. Illinois*, 408 U.S. 786, 810 (1972) (Marshall, J., concurring in part and dissenting in part); *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) ("the police are part of the prosecution"); *United States v. Bryant*, 439 F.2d 642, 640 (D.C. Cir. 1971) (" 'prosecution' is certainly broad enough to include investigation."); *United States v. Banks*, 383 F.Supp. 389, 395 (D.S. D. 1974) (the prosecution "is saddled" with an FBI agent's negligent or deceitful non-disclosure of evidence.); *Emmett v. Ricketts*, 397 F.Supp. 1025, 1041 (N.D. Ga. 1975) (a clinical psychologist and hypnotist who treated a prosecution witness "was as much a member of the prosecutorial team as any of the police officers investigating the murders."); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973); *United States v. Eley*, 335 F.Supp. 353 (N.D. Ga. 1972); *Nash v. Purdy*, 283 F.Supp. 837 (S.D. Fla. 1968); *Evans v. Kropp*, 254 F.Supp. 218 (E.D. Mich. 1966); *Boone v. Padenick*, ____ F.2d ____, (4th Cir. 1976), No. 76-1090 ("where material evidence which tends to exculpate the defendant is not disclosed, such failure is not neutralized because it was in the hands of the police rather than the prosecution.").

occurs by interfering with the right to counsel and that proof of disclosure to the prosecution or other prejudice is not required, is necessary to effectuate the purposes of the Sixth Amendment. The chilling effect, indeed the freezing effect, upon attorney-client communications which a contrary rule would have, would be exceeded only by abrogation of attorney-client confidentiality altogether. To conclude otherwise is to ignore experience.

Most defendants, even if there is proof of interception, as there is here, will not be able to show that the prosecution knew of or used the intercepts. No official accused of misconduct can be expected to confess guilt. Quite the contrary, as here, they loudly protest their innocence. Since proof of use or knowledge would depend in almost every case upon a confession of guilt, requiring such proof would render the protection of the Sixth Amendment illusory. As for proof of prejudice from the use of attorney-client intercepts, that will in most cases be simply unascertainable. There is no reliable way to determine precisely how a case would have been tried in the absence of the Sixth Amendment violation or the effect of such trial upon the jury.

Black and the cases which adopt its logic, do not rest upon the assumption that prosecutors and law enforcement officers automatically and systematically lie or suppress the truth.[21] These cases are grounded, rather,

[21] The record in this case does, however, disclose systematic lying and suppression of the truth by the state. Not only do the inconsistencies in testimony and lapses of memory of witnesses at the trial demonstrate evasion, but the admitted conduct of the prosecution is a web of distortions, half-truths, and out-right lies. Weatherford's repeated denials, for example, that he had been approached by law enforcement officers, his later assertions that he had approached law enforcement officers but had spurned their entreaties, his protestations that he would not testify or be present in court the day of Bursey's trial, were, quite simply, deliberate lies. The unpleasant but plain truth of the matter is that the state has rarely been capable of the truth throughout its proceedings against Bursey.

in the basic and fundamental nature of the right to counsel in our constitutional scheme, and in the knowledge that absent the rule they establish, defendants would rarely, to the point of never, be able to establish their entitlement in interception cases to Sixth Amendment protection. Where the state has jeopardized the Sixth Amendment right to counsel and created a great potential for harm, it is only fair that it bear the consequences of its misconduct, and that defendants not be given an impossible burden of proof, the effect of which would be to defeat the constitutional right.[22] As this court said in *Glasser v. United States*, 315 U.S. 60, 75-6 (1942), involving a defendants' right to loyal counsel:

> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of . . . [his attorney] as counsel for . . . [a co-defendant] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

The rule in *Glasser* has been followed in subsequent cases involving denial of counsel. In *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961), the Court held that absence of counsel at arraignment violated due process and that "we do not stop to determine whether prejudice resulted. . . . In this case . . . the degree of prejudice can never be known." The same analysis was applied in *White v. Maryland*, 373 U.S. 59, 60 (1963),

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[22]"A rule of constitutional principal is useless, if the burden of proof necessary to vindicate it is so heavy as to preclude its being effective." *United States ex rel. Cooper v. Denno*, 221 F.2d 626, 631 (2nd Cir.) (Frank, J., concurring opinion), *cert. den.*, 349 U.S. 968 (1955).

and the same result reached: "[W]e do not stop to determine whether prejudice resulted. . . ."

In other cases involving rights deemed fundamental to a fair trial, this Court has similarly not indulged in speculation as to the degree of prejudice flowing from denial. In *Peters v. Kiff*, 407 U.S. 493, 504 (1972), it held that a white defendant had standing to complain of exclusion of Negroes from his jury and that no showing of prejudice to his defense resulting from the exclusion need be shown.

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. . . . Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. . . . In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few. (footnote omitted.)

This Court has also held that regardless of whether there is a showing of actual prejudice, constitutional protection is denied a defendant by state trial practices that create the likelihood or even the appearance of unfairness. *In re Muchison*, 349 U.S. 133, 136 (1955). Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court ruled that a judge who had a financial interest in the outcome of a trial could not sit in judgment, even though he might resist the temptation to influence the case. In *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), the Court concluded that a jury could not constitutionally try a defendant where it had been placed in the protective custody of deputy sheriffs who were also the

chief witnesses for the prosecution, even though there was no showing of actual prejudice.

> And even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in their continual association throughout the trial between the jurors and these two key witnesses for the prosecution.

In *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963), a murder conviction was reversed because of pre-trial publicity in the form of a televised interview of the accused in which he admitted guilt. Even though only three members of the jury panel had seen the interview, and even though they all stated that they could give the defendant a fair trial, the Court did "not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" Also see, *Marshall v. United States*, 360 U.S. 310 (1959), *Irvin v. Dowd*, 366 U.S. 717 (1961).

The same rule was also applied in *Estes v. Texas*, 381 U.S. 532, 544 (1965), to hold unconstitutional a televised trial even though "one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." And see *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Like the right to a fair and impartial judge and jury, the right to counsel has been regarded as so fundamental that its denial or dillution is unconstitutional even in the absence of a showing of actual prejudice. Respondent does not believe that any

argument advanced in this case by the state justified abandonment of this well established constitutional principal.

F. Decisions of lower Courts protect attorney-client communications from interception by the Government.

The *Black, O'Brien, Hoffa, Copeland, Caldwell* line of cases has been followed by other courts. *United States ex rel. Cooper v. Denno*, 221 F.2d 626 (2nd Cir. 1955), *cert. den. sub nom. Cooper v. Denno*, 349 U.S. 968 (1955), involved an allegation that a plainclothes police officer had been planted in a seat reserved for spectators near the defense table at trial. The court of appeals held that the accused failed to prove the allegation of planting the officer. But the court said, "[i]f the allegation, without more, is supported by evidence which will justify such a finding, then petitioners' fundamental rights have been denied. That such action resulted in no prejudice to the accused does not void or excuse the violation. *Glasser v. United States*." 221 F.2d at 628.[23]

In *United States v. Rispo*, 460 F.2d 965 (3rd Cir. 1972), the prosecution revealed after conviction that one of the defendants at trial had participated in the acts on which the charges were based as a paid

[23]See *United States v. Lebron*, 222 F.2d 531 (2nd Cir. 1955), where there was an informer present at a meeting with defendants, counsel and others at which nothing concerning the defense except how to raise defense funds was discussed. The court recognized that if an informer intruded upon a conference between witnesses and counsel even with the accused absent the conviction would be void.

government informer. Though it was not shown that the informer "took part in conferences relating to the trial," his attorney, who was unaware of his client's true identity for much of the trial, "participated in pretrial and trial conferences and strategy sessions, and discussed those strategy sessions with him." 460 F.2d at 973, n. 14, 976 n. 22. Noting that "[t]he possibility of prejudice implicit in such a situation is unlimited," the court, citing *Black* and *O'Brien*, held that the defendant was entitled to a new trial. 460 F.2d at 976 n. 22. "The ends of justice are not served by such deception, and even the appearance of justice becomes unattainable." 460 F.2d at 977. Other cases to like effect include *Via v. Cliff*, 470 F.2d 271, 275 (3rd Cir. 1972), a damage action under §1983 by an inmate alleging denial of access to counsel prior to trial: "There is no requirement that Via show that his 'counsel's preparedness for trial was affected in any way.' "; *Taglianetti v. United States*, 398 F.2d 558, 570, n. 12 (1st Cir. 1968); *aff'd per curiam*, 394 U.S. 316 (1969) ("an intrusion relevant to the current prosecution" would entitle defendant to a new trial.); *Brzozowski v. Randall*, 281 F.Supp. 306, 311 (E.D.Pa. 1968) (rejecting the contention that no Sixth Amendment violation would result unless "detrimental evidentiary matter" was extracted during the period of denial of counsel.); *McArthur v. Pennington*, 253 F.Supp. 420, 429 (E.D.Tenn. 1963) (acquitted plaintiffs awarded $5,100 each for violation by police of protected rights including putting "them in jail without giving them an opportunity to phone their lawyer.")

The state argues that a number of lower courts have either expressed disagreement with the *Black, O'Brien, Hoffa* line of cases, or adopted new rules for resolving

the constitutionality of interception of attorney-client communications. More specifically they contend that lower courts have rejected the so-called *per se* rule which relieves the defendant of the burden of showing disclosure or prejudice where there has been capture of attorney-client communications. The cited cases, however, are distinguishable on their facts from this case, and upon examination, in spite of their dicta, generally do not constitute as decided a departure from *Black, O'Brien* and *Hoffa*.

In *United States v. Scott*, 521 F.2d 1188 (9th Cir. 1975), there was no attorney-client relationship present to intrude upon. The defendant represented himself *pro se* and was deemed to have waived or renounced the right to counsel. *Ibid.*, at 1191. The court also said that Scott has so widely published his defense as to waive any claim to defense privacy as a matter of due process. *Ibid.*, at 1193. In *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976), although there was evidence that the informer had infiltrated the American Indian Movement with which Crow Dog was associated, there was apparently no direct evidence that the informer was present during any discussions of defense strategy relevant to Crow Dog's trial. *Crow Dog* acknowledges, however, that a Sixth Amendment violation would have occurred had the agent gained information relating to the defense through an intrusion into the attorney-client relationship. 532 F.2d at 1198. In *United States v. McCord*, 509 F.2d 334 (D.C. Cir. 1974), *cert. den.* 95 S.Ct. 1656 (1975), the court concluded that any disclosures of confidences were voluntary on the defendant's part.

In *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), the attorney-client communications overheard by state prison officials were unrelated to the federal

offense charged. *See United States v. Brown*, 317 F.Supp. 531, 535 (E.D.La. 1970). There was also testimony that Brown knew his conversations were being monitored. 317 F.Supp. at 533. In *Manuel v. Salisbury*, 446 F.2d 453 (6th Cir. 1971), there was no proof of the existence of an attorney-client relationship or that communications had been intercepted. In *United States v. Fanning*, 477 F.2d 45 (5th Cir. 1973), there was no proof of the existence of an attorney-client relationship. In *United States v. Cooper*, 397 F.Supp. 277 (D.Neb. 1975), there was no evidence that the agent overheard anything relating to trial strategy or any communications between the defendants and their lawyers. In *State of South Dakota v. Long*, 465 F.2d 65 (8th Cir. 1972), the conversations were ones which the prosecutor could hear and were recorded in open court. In *United States v. Aldivisio*, 424 F.2d 20 (10th Cir. 1970), no attorney-client relationship existed at the time communications were overheard. In *United States v. Choate*, 527 F.2d 748 (9th Cir. 1975), no information relating to the defense was communicated to the agent prior to revelation by him of his identity.

Also see *United States v. Rosner*, 485 F.2d 1213 (2nd Cir. 1973); *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970), and *United States v. Mosca*, 475 F.2d 1052 (2nd Cir. 1973), *cert. den.*, 412 U.S. 948 (1973). *Zarzour* concerned a paid informant assisting the defense. He was paid to assist the government in matters unrelated to the prosecution. The court viewed the activity with "a jaundiced eye," but concluded that *Coplon, Caldwell, Hoffa* and *Black* required a showing that the government's evidence was "tainted." 432 F.2d at 3. *Zarzour* is incorrect in this conclusion since only in *Coplon* was the evidence tainted, and *O'Brien v. United States* made it clear that proof of taint was not

required. The *Mosca* case involved interference only in that the defendant-informer appeared at two pre-trial conferences attended by the trial judge and counsel for both sides. The court found no prejudice but condemned the practice as "beneath the high standards of professional conduct expected of government counsel." 475 F.2d at 1061.

G. Bursey was in fact prejudiced by the State's deceit and there was interception by the prosecution of attorney-client communications.

Even were this Court to decline to follow the rule of *Black, O'Brien* and *Hoffa* and conclude in Sixth Amendment cases that proof of disclosure or use by the prosecution of intercepted attorney-client communications or other prejudice to the defense is a condition for relief, the opinion of the court of appeals would still be correct. Weatherford, as the court of appeals found, *was* a member of the prosecution. He intercepted attorney-client communications and as a result was "fully acquainted with Bursey's trial strategy." A. 261. The court of appeals also found that Weatherford talked with the prosecutor prior to trial. Both Weatherford and Solicitor Foard deny that they discussed defense trial strategy—but they certainly could have. If Bursey's burden is to prove that they did, then realistically the guarantee of effective assistance of

counsel in such cases as this means very little.[24] But even if Weatherford is not regarded as a member of the prosecution, and even if no disclosure or use by the prosecutor of intercepted communications were found to exist, Bursey was still prejudiced by the state's deceit. As the court of appeals found, some of the prejudice resulted from Weatherford's repeated misrepresentations to Bursey and his lawyer of the evidence the state would present.

The Solicitor General contends that Weatherford did not "volunteer misleading information." Brief, at 45. That is simply not so. Weatherford said that he had trouble raising his bail and remained in jail for several days. He volunteered misleading information when he said that. Weatherford said he was a co-defendant. He volunteered misleading information when he said that. Weatherford said that Dr. Hardwick had retained lawyer Taylor to represent him. He volunteered misleading

[24]The Solicitor General in his amicus brief speculates that the conversation between Foard and Weatherford "evidently consisted of no more than Foard's indicating to Weatherford the possibility that he might have to call him as a witness." Brief, at 44. Weatherford, of course, knew when he went to Solicitor Foard's office that he would be a witness. "I knew I was going to Court, and I guess there was no question at that point." A. 194. As for the contents of their discussion, the Solicitor General fails to note, apparently due to lack of access to those portions of the record not included in the printed appendix, that somebody actually coached Weatherford about his testimony. It was explained to Weatherford that he must "speak loudly" and "be polite and straight forward with any answers" during cross examination. Deposition of Jack McIver Weatherford, at 121. The Solicitor General also says "[n]or . . . is there any evidence that Weatherford was 'fully acquainted' with respondent's trial strategy." Brief, at 44 n.28. That assertion reflects, quite simply, a total unfamiliarity with the record. See, *supra*, at

information when he said that. Weatherford said that he was going to be tried separately from Bursey. He volunteered misleading information when he said that. Weatherford said that he had gone to Hilton Head at the insistence of Dr. Hardwick to talk with law enforcement agents about his case. He volunteered misleading information when he said that. Weatherford said that he would not testify against Bursey or be present in court the day of the trial. He volunteered misleading information when he said that. The government's assertion that Weatherford did not "volunteer misleading information" is, upon the facts of this case and as found by the court of appeals, flatly inaccurate.

The citation to the record which is said to support the Solicitor General's assertion (A. 253) involves, not whether Weatherford volunteered misleading information, that is conceded, but whether the information volunteered about the severance of Weatherford's trial from Bursey's, and Taylor's apparent lack of interest in Weatherford's case, should have in fact misled Bursey. The district court felt that it should have put him "on notice." The court of appeals "wholly" disagreed. "We wholly disagree with the court below that Weatherford's . . . indication that he would seek a severance of his own trial should have put Bursey and his lawyer on notice 'that Weatherford might an agent.' " A. 262. The court of appeals also found that Weatherford's general conduct was deceptive, and that whether or not Bursey should have been "put on notice" was irrelevant. "It is not a defense for appellees to show that in spite of the prosecutor's best efforts to conceal the truth a more astute victim might not have been deceived. Such an approach is a caricature of the *Brady* principal." *Ibid.* It

might be argued that Bursey should not have been deceived. But nowhere in this case has it ever been argued, except in the Solicitor General's brief, that Weatherford didn't try to mislead the defense or that he didn't volunteer misleading information.[25]

Other prejudice to Bursey, as the court of appeals found, was the denial of an opportunity to do a background check on Weatherford for purposes of cross-examination, to consider whether plea bargaining might be the best course and to attempt to counter the devastating impact of eyewitness identification. And as lawyer Wise admitted, his ability to conduct the defense generally was substantially impaired after the shocking revelation of the co-defendant's identity.

In *Black, O'Brien, Hoffa, Coplon* and *Caldwell*, as here, the government intruded or permitted intrusions into the attorney-client relationship. But in none of the former did the government deliberately misrepresent to the defendant and his attorney what the prosecution's case would be, thereby manufacturing surprise and insuring that the defendant would be unable to prepare for the case actually presented. *Cf. Coleman v. Alabama*, 399 U.S. 1 (1970) and *United States v. Wade*, 388 U.S. 218 (1967). Bursey's trial was not a fact finding process by equally contending adversaries such

[25]The Solicitor General's argument that Weatherford did not attempt to mislead is as extraordinary as are its contentions that Bursey's defense was not disrupted by the state's deceit and that it made "little difference to the defense whether Weatherford or someone else was the informant." Brief, at 43. The record citation which is said to support the position is to cross-examination of Lawyer Wise involving plea bargaining. But as Wise and Bursey testified, the fact that Weatherford was the agent made all the difference in the world. See, *supra*, at .

as is contemplated by our system of criminal justice. It was an ambush. See, infra, at .

H. Weatherford intruded upon the defense camp.

The state argues at length that Weatherford did not intrude into Bursey's defense camp but was an invitee. Thus, it reasons, no Sixth Amendment violation could have occurred. The contention is not supported by the record. As the court of appeals found, the intrusion here "was not inadvertent but was knowingly permitted by the prosecution." A. 260. The court of appeals also concluded that the intrusion was knowingly arranged by the prosecution. *Ibid.* The record fully substantiates the court of appeals' findings. Weatherford, it must be remembered, by his own admission and by Strom's as well, continued to investigate Bursey after the arrest. To assist in the investigation, Solicitor Foard and Strom resorted to an elaborate scheme of deceits—the arrest and bail deception, the joint indictment, the phoney attorney ruse, the Merrick ploy, the severance, the Hilton Head fabrication, the informer's pledges of loyalty and his promises not to be a witness. As a direct consequence of these acts, and as part of his continuing investigation of Bursey, Weatherford gained access to defense counsels and discovered Bursey's entire trial strategy.

It is a torture of the language to contend that Weatherford did not intrude upon the defense camp. He did precisely the thing which he was paid and instructed to do. The contradictions inherent in the government's arguments are apparent. It argues on the one hand that Weatherford needed cover to continue his investigations of Bursey and others. But in the same

breath, it argues that Bursey was not investigated at all—that Weatherford was a passive invitee. *Cf. Hoffa v. United States*, 385 U.S. 293, 295 (1966), where the contention that Partin was not "placed" in the defense camp was regarded as "verbal controversy." Also see the government's brief in *Hoffa*.

> We recognize, however, that this is not the end of the inquiry. There remains the contention that the government took impermissible advantage of Partin's presence in Nashville and his willingness to report what he heard to the government. In line with our acquiescence in the principles underlying the *Caldwell* and *Coplon* decisions (p. 71, *supra*), we agree that if the government had seized on the opportunity (which was not of its making) to obtain defense secrets or other privileged information from him in violation of the *Caldwell* and *Coplon* decisions, a Sixth Amendment violation would have occurred. (Brief, at 84) (Footnotes omitted.)

The district court, although it found against Bursey, recognized that the natural consequence of the various deceits practiced in the case was to throw the co-defendants together and to facilitate discussion of their cases. For example, the court noted that lawyer Wise and Weatherford had discussed the way in which Taylor intended to defend Weatherford. "This was a natural reaction of a younger attorney trying to learn from an older, more experienced attorney." A. 249. By the same token, nothing could have been more natural than that Weatherford and Wise would also talk about Bursey's case. That, as the court of appeals found, is exactly what they did. A. 261.

I. Respondent does not depend upon a breach of the common law attorney-client privilege for relief, but the privilege was violated in this case.

The state argues that by "inviting" Weatherford into attorney-client discussions Bursey "waived" any privileged or confidential relationship, citing 8 Wigmore, Evidence §2311 (McNaughton Rev. 1961).[26] Brief for Petitioners, at 12. Bursey denies that Weatherford was an "invitee," but even if that were so, and even if it were true that the common law attorney-client privilege had been waived, all that would result would be that Bursey and his attorney, as far as the privilege was concerned, could be compelled to disclose confidences made in Weatherford's presence. But what Bursey and Wise might have to disclose is not an issue in this case. The issue is whether there was interference with the Sixth Amendment right to counsel.

The Sixth Amendment right to counsel and the common law attorney-client privilege are no co-equal. One is a broad constitutional principle, the other only a rule of evidence.[27] Surreptitious interception of

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[26]Wigmore defines the common law attorney-client privilege as follows:

> (1) Where legal advise of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself, or by the legal adviser, (8) except the protection be waived.
>
> 8 Wigmore §2292.

[27]The latter is said "to be strictly construed within the narrowest possible limits," *Radiant Burners, Inc. v. American Gas Assoc.*, 320 F.2d 314, 323 (7th Cir.), *cert. den.*, 375 U.S. 929 (1963), while the former has never been given "a narrowly literalistic construction." *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 2553 (1975).

attorney-client communications, for example, according to Wigmore, would not violate the Sixth Amendment's guarantee of the effective assistance of counsel. According to Wigmore, "[o]ne who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy." 8 Wigmore, Evidence §2326 (McNaughton Rev. 1961). The attorney-client privilege is not engaged in such cases since neither the attorney nor the client is called upon to divulge confidences. The interceptor however, according to Wigmore, is not within the privilege and could be compelled to testify as a matter of evidence law.

Because the state misapprehends the nature of the attorney-client privilege, and regards it as co-equal with the Sixth Amendment, its analysis of *Coplon v. United States*, 191 F.2d 749 (D.C.Cir. 1951), is faulty. The attorney-client privilege had nothing to do with the ruling in *Coplon* that the government's conduct was unlawful. *Cf. Hoffa v. United States*, 385 U.S. 293 (1966). Similarly, this case does not depend upon a violation of the attorney-client privilege.

Although Bursey does not depend upon a violation of the common law attorney-client privilege for relief in this case, it appears that the state did in fact violate the common law privilege. The general rule is that the presence of third parties, not agents of either the client or attorneys, destroys the confidential nature of attorney-client communications. But there are exceptions to the general rule, and one of them is that communications between lawyers and co-defendants are within the privilege. The leading cases allowing a

privilege for co-defendant exchange of information are *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964) and *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965). In *Continental*, attorneys for two witnesses who had testified at a grand jury proceeding exchanged memoranda that they had prepared involving their clients' testimony. The court quashed subpoenas directed to the attorneys to disclose the memoranda concluding that they were confidential and within the attorney-client privilege. *Hunydee* involved a pre-indictment conference between two defendants and their respective attorneys. At trial, one of the defendants and her counsel were permitted, over objection, to testify concerning the conference. The court reversed and remanded for a new trial noting that the rule announced in *Continental* "is that where two or more persons who are subject to possible indictment in connection with the same transactions made confidential statements to their attorneys, these exchanges, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings." 355 F.2d at 185. The court accordingly held that the defendant's admissions to his attorney, even though made in the presence of a co-defendant and her attorney, were within the attorney-client communication privilege, and that it was error to have allowed the attorney and the co-defendant to testify.[28]

Weatherford's presence in attorney-client discussions, because he was theoretically a co-defendant, should similarly not breach the protection afforded by the attorney-client privilege.

[28]See "Attorney-Client Privilege," 8 Col. J.L. & Soc. Prob. 179, 182-89 (1972).

II.

THE STATE'S DECEITS AND AFFIRMATIVE MISREPRESENTATIONS OF ITS CASE DENIED RESPONDENT A FAIR TRIAL.

This case does not involve whether a defendant in a criminal case is entitled to discover the identity of informers prior to trial. *Cf. Roviaro v. United States*, 353 U.S. 53 (1957). It does involve, however, whether the state may deliberately lie to a defendant about the evidence it will present.

The function of our adversary system of criminal justice is to ascertain the facts so that a reliable determination of guilt or innocence can be made. Whether or not the prosecution is required to disclose the evidence it intends to use to facilitate that fact finding process,[29] it surely should not be entitled actively to subvert it by deliberately misleading the defendant as to the evidence it intends to use.

If the prosecution is allowed to deceive a defendant, as it did here, then the defendant will of necessity be unable to prepare properly for trial. The trial he would have prepared for based upon the state's misrepresentations would be one that never would be held. Thus, the defendant's role in the adversary process of presenting and evaluating for the trier of facts the relevant evidence would be undermined. To that extent the judicial fact finding process, both because of surprise and the lack of a chance for effective preparation for trial, would be rendered less reliable and the criminal justice system subverted. See Brennan, J., "The

[29]See Nakell, "Criminal Discovery for the Defense and Prosecution: The Developing Constitutional Considerations," 50 N.C.L. Rev. 437 (1972).

Criminal Prosecution: Sporting Event or Quest for Truth?" 1963 Wash.U.L.Q. 279. Other interests of the defendant and the justice system, as the court of appeals found in this case, would be jeopardized. Having been deceived about the strength of the state's case, the defendant would be deprived of the opportunity intelligently to decide whether plea bargaining is in his best interests. Whether or not access to plea bargaining is constitutionally required, a procedure which defeats the opportunity to resort to it disserves "the ends of justice." *Williams v. Florida*, 399 U.S. 78, 106 (1970) (Burger, C.J., concurring).

This Court has held that because a criminal trial "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played," *Williams v. Florida, supra*, 399 U.S. at 82,[30] that a Florida statute requiring a defendant to give notice to the prosecution of his alibi defense prior to trial was constitutional. "We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Ibid.* If the search for truth is enhanced by protecting the prosecution from undue surprise, by the same token the search for truth should be equally enhanced by protecting the defendant from undue surprise and not depriving him of the opportunity to meet the facts and issues in the state's case.

[30]Commentators have also observed that "the day has long since passed when a case is to be tried from ambush." Kaufman, "Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts," 57 Colum. L. Rev. 1113, 1119 (1957).

This case does not present the question of whether the prosecution must save a defendant from surprise by opening its files. The question presented is whether the prosecution is allowed to *manufacture* surprise by lying to a defendant about its evidence, thereby insuring that the defendant will be inadequately prepared at trial.

This Court has long recognized that the prosecution has a duty to deal fairly with persons charged with crime. In a series of cases beginning with *Mooney v. Holohan*, 294 U.S. 103 (1935), it has held that law enforcement officers or the prosecution may not manipulate the trial to the disadvantage of the defendant by knowingly using or failing to correct false evidence or to withhold from a defendant, intentionally or not, and whether requested or not, material exculpatory evidence, including evidence useful only for impeachment of witnesses at trial. *United States v. Agurs*, ____ U.S. ____, 96 S.Ct. 2392 (1976); *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *White v. Ragen*, 324 U.S. 760 (1945); *Pyle v. Kansas*, 317 U.S. 213 (1942). The reason that the prosecution may not use deception and trickery in the presentation of its case, aside from undermining the reliability of the fact finding process of the adversary system and creating barriers to plea bargaining, is that the prosecution "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

In *Brady v. Maryland*, the prosecutor disclosed several statements to the defendant, but not one in which the co-defendant admitted himself to be the trigger man. In concluding that the state's conduct violated due process, the Court said: "Society wins not only when the quilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. In *Alcorta v. Texas*, the prosecutor allowed a witness to testify that he and the defendant's wife had not had any dates when the prosecutor knew that they had been lovers. This Court reversed Alcorta's conviction for the reason that the prosecution had allowed the witness to testify falsely, thereby denying the defendant a fair trial.[31] Unfairness in the conduct of trial has not been limited to the *Brady* and *Alcorta* situations involving use of perjured testimony or the suppression of material, exculpatory evidence by the prosecution. Unfairness has been found to result where the prosecution failed to disclose the identity of informers whose testimony was relevant and might be helpful to the accused, *Roviaro v. United States*, 353 U.S. 53 (1957). Unfairness has also been found to be inherent in a state statutory scheme allowing the prosecution to indict for a more serious offense where a defendant has taken a de novo appeal. The denial of

[31] In *Brady* and *Alcorta*, the deception was practiced before and during trial. In this case the deception was abandoned at trial. But the distinction is not significant for a defendant is as much entitled to constitutional protection during preparation for trial as at the trial itself. See *supra*, at 34-7; and *United States v. Wade*, 388 U.S. 218, 231-32 (1967) ("the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.")

due process was not based upon any defect in the fact finding process arising from the state statutory scheme or doubts as to the defendant's guilt. "The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process requires a rule analogous to that of the [*North Carolina v.*] *Pearce* case [395 U.S. 711 (1969)]. We conclude that the answer must be in the affirmative." *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). The opportunity for vindictiveness was also present in the case. A. 92.

This Court has not catalogued all the circumstances in which prosecutorial practice or conduct might deny a defendant a fair trial. But it would be intolerable to conclude, as is urged here, that deliberate and systematic lying by the prosecution as to the evidence it will present at trial, is constitutionally acceptable, or that if the prosecution is not allowed to lie and deceive, it will weaken law enforcement.[32] Cf. *United States v. Nixon*, 418 U.S. 683, 703-16 (1974).

[32]The arguments in the Solicitor General's brief dealing with conduct of trial involving bypass or collateral estoppel, Brief, at 49-52, were never raised in the pleadings or argued by the petitioners at any stage of these proceedings. Being affirmative defenses, and not having been pleaded or argued, they were waived. Rule 8(c), F.R.Civ.P., *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 n.19 (1975).

III.

THERE WAS NO LEGITIMATE NEED FOR MAINTENANCE OF THE INFORMER'S COVER; BUT IF THERE WERE, THE NEED COULD NOT OVERRIDE RESPONDENT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

According to the state, Weatherford had "great value" as an agent and that was why his cover had to be maintained. Brief for the Petitioners, at 12. The record, however, does not support the claim. It is actually impossible to reconstruct what Weatherford did as an informer for SLED, for neither SLED nor Weatherford kept any records of his activities. A. 185-86. The record does disclose that: Weatherford never made a single arrest as an agent for SLED; he testified at only one trial–Bursey's; he was "[i]nclined to say," 'Yes, sir,' " that some of his assignments had led to convictions but he couldn't remember a single case in which that had happened. A. 186. The only intelligence which the record documents that Weatherford furnished SLED involved Bursey. The record discloses other things that Weatherford did as a state law enforcement officer: he vandalized the Administration Building at the University of South Carolina; he participated in a conversation with Bursey and others about a guerrilla theatre skit to celebrate National Anti-Draft Week, which mysteriously escalated into malicious destruction of property; he made no effort to stop the commission of the crime; and, he went to Atlanta, Georgia, and applied for membership in the Venceremos Brigade, ostensibly to go to Cuba. A. 176-77. The state's case for a need for cover is really based upon the conclusory and self-serving generaliza-

tions of law enforcement agents that Weatherford was of "great value" and was working on "other things." What those things were is simply not discoverable in this record.

Strom never seriously argued that there was a real need for Weatherford's cover to be maintained. Although he said initially that there were other "problems" at the University (presumably Bursey), he admitted to the trial judge that Weatherford wasn't working on "anything particular" where he had to maintain his cover. A. 125. Strom also admitted that while he wasn't going to announce in the newspaper that Weatherford was an informer, he wouldn't be shocked if that happened. The reason Strom was not particularly concerned about Weatherford's cover was that he doubted he could be effective as an undercover agent after the arrest. A. 124-125. The state's case for law enforcement need is simply not made out.[33]

The state also argues that Weatherford needed to maintain his cover because "it was felt that the agent's life might be in danger if his identity was known." Brief of Petitioners, at 12. The apprehension was Solicitor Foard's, not Weatherford's. Strom offered protection to Weatherford after he testified but Weatherford turned it down. A. 107.

What is significant about the claimed need for maintenance of Weatherford's cover is that the state itself blew the cover and revealed Weatherford as an

[33]In its amicus brief, the government valiantly tried to shore up the state's case of need to retain Weatherford's cover. But the efforts reflect, again, a lack of familiarity with the record. The Solicitor General says that "Weatherford could not be replaced on short notice." Brief, at 42. The statement is pure speculation. Perhaps there were scores of people anxious to get on the SLED payroll and inform. The state, of course, never argued the point.

agent. Had Weatherford been of such "great value" and the need for law enforcement so acute, or had the informer's life really been in danger, quite simply Weatherford would have been kept underground. The record in this case points irresistibly to the conclusion that the reason Weatherford's cover was maintained was to insure that he would be a devastatingly effective witness at Bursey's trial.

Even if the maintenance of Weatherford's cover in light of the facts of this case is regarded as a legitimate law enforcement need, that does not end the matter. For the state's interest in maintaining an agent's secrecy must give way when it conflicts with a defendant's right to a fair trial. In *Roviaro v. United States*, 353 U.S. 53, 62 (1957), involving the revelation of an informer's identity who had participated in the crime for which Roviaro was charged, this Court said that the "problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." In balancing those interests the Court concluded that the informer's testimony" was highly relevant and might have been helpful to the defense" and found it error for the district court to have refused to compel disclosure of the informer's identity. 353 U.S. at 63-4. The "balancing" in *Roviaro* was thus a limited sort, for the defendant having shown a need for disclosure, the state could never have tipped the scales in favor of secrecy.[34]

[34]*Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974), where the Court concluded that a privilege "based only on the generalized interest in confidentiality . . . cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."

While this case does not involve whether the state must disclose an informer's identity, it does involve whether the state's interest in maintaining an informer's cover outweighs a defendant's interest in receiving a constitutional trial. It clearly does not. On the facts of this case, moreover, it does not appear that there was actually a "flow of information" to protect. Had there been Weatherford would not have been called as a witness.

Just as the state has no interest in secrecy sufficient to deny a defendant a fair trial through non-disclosure of relevant and needful witnesses, the state could have no interest sufficient to deny a defendant the assistance of counsel. The right to counsel is an absolute precondition to a fair trial and denial of it is *per se* unconstitutional. *Argersinger v. Hamlin*, 407 U.S. 25 (1972),[35] *Glasser v. United States*, 315 U.S. 60 (1942), and *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

But even if there were such a doctrine as "justifiable denial of counsel," no justification is even colorably made in this case. Presumably the standard for denial would be whether it promotes a compelling state interest[36] since the rights involved, counsel and a fair trial, are fundamental. *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Estes v. Texas*, 381 U.S. 532 (1965). The state would have to show that its actions serve a compelling state interest and that there is no less

[35] *Argersinger* rejected the notion that insufficient national "legal resources" could justify denial of counsel to indigents charged with petty offenses. 407 U.S. at 37, n.7.

[36] By no means does Bursey concede such a test is applicable, but makes this argument only to show that the strictest test known to constitutional law is not met by the state.

restrictive means to protect this compelling interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Griswold v. Connecticut*, 381 U.S. 479 (1965). The test is not met here.

The intrusion of the informer, "always unpleasant business despite the conceded importance of informers for the administration of criminal justice," *United States v. Huss*, 482 F.2d 38, 41 (2nd Cir. 1973), was completely unwarranted after Bursey's arrest. It was not utilized to investigate an on-going crime. In *Hoffa v. United States*, 385 U.S. 293 (1966), the informer reported an on-going jury tampering attempt. In *Caldwell v. United States*, 205 F.2d 879 (D.C.Cir. 1953), the agent was instructed by the prosecutor to disassociate himself from the defense camp. He got the go-ahead only when he reported a plot to steal the prosecutor's files. Not only was there no ongoing criminal activity present according to Strom for Weatherford to investigate, but there was no general need of law enforcement for him to maintain his cover. Both Strom and Weatherford agreed that disclosure would not have jeopardized SLED's law enforcement mission. Weatherford's role with SLED might have changed following disclosure but not his effectiveness as a law enforcement agent. Had he been rendered ineffective, he obviously would never have been offered permanent employment as a SLED agent. At best, the claim of law enforcement need amounts to law enforcement convenience, and that is not a compelling interest justifying denial of counsel or any other fundamental right. *Griffin v. Illinois*, 351 U.S. 12 (1956), *Argersinger v. Hamlin, supra, Duncan v. Louisiana*, 391 U.S. 145 (1968), *United States v. Nixon, supra.*

The state, where it does have a legitimate need for secrecy, may protect that interest in ways which do not involve either disclosure or denying persons accused of crime the protection of the constitution. If it really values secrecy, it can refuse disclosure and dismiss its action against the defendant. See, *e.g.*, *Portomene v. United States*, 221 F.2d 582 (5th Cir. 1955); *United States v. Conforti*, 200 F.2d 365 (7th Cir. 1952); *Sorrentino v. United States*, 153 F.2d 627 (9th Cir. 1947). In cases other than those involving the identity of informers, the courts have similarly held that the government is free to resist disclosure of secrets. But if it does so, and the information withheld is relevant to the defense, it may not proceed with prosecution. See *Jencks v. United States*, 353 U.S. 657, 671 (1957), quoting from *United States v. Reynolds*, 345 U.S. 1, 12 (1953) ("the rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.").

The Solicitor General says this case establishes a "fail safe" method of revealing the identity of informers, since a person invited into another's defense counsels would decline *only* if he was an informer. Brief, at 11, 21. The hypothesis ignores the variety of human behavior and the multitude of reasons a person might decline such an invitation. Moreover, FBI agents and informers, according to the Solicitor General's brief,[37]

[37]"The standards for the use of intelligence informants are contained in internal FBI directives that are not available to the public." Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Book III, p. 229.

are *already* "instructed not to attend [defense planning] sessions." Brief, at 34, n. 23. If the instructions are to be more than gibberish, they obviously mean that agents are to decline invitations to meet with counsel for defendants to discuss defense strategy. How the court of appeals' opinion suddenly formulates a "fail-safe" method for detecting informers in view of this existing practice is inexplicable. In any case, the constitution simply does not allow the prosecution to lie to a defendant and deny him counsel and a fair trial in order to maintain an agent's cover.

IV.

THE COURT OF APPEALS PROPERLY CONCLUDED THAT STROM'S OWN DECISIONS DIRECTLY CAUSED THE DENIAL TO RESPONDENT OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL.

The court of appeals that Strom (1) participated in the decision to maintain Weatherford's cover; (2) he entrusted the details of perfecting the cover to Solicitor Foard, who was at his office the day of the arrest; and (3) that he concurred personally in the decision to allow Weatherford to testify. Moreover, as the court of appeals noted, "according to appellees' own argument on appeal, contact of the type which occurred in this case and violated Bursey's constitutional rights was absolutely essential to the continued viability of Weatherford as an undercover agent in view of his close relationship with Bursey." A. 262. The state does not dispute the accuracy of these findings, only the legal consequences to be attached to them. Based upon its

findings, the court of appeals held that the district court's finding that "there is no testimony connecting defendant Strom with any . . . acts allegedly committed by Weatherford" was clearly erroneous,[38] and that its legal analysis of Strom's liability was incorrect. *Ibid.*

The state argues that even if Weatherford violated Bursey's consitutional rights, and even if Strom was involved in maintaining Weatherford's cover, as the court of appeals found, that Strom could be liable only if he had "direct knowledge" of Weatherford's intrusions into the defense camp. Brief for Petitioner, at 22. Strom, of course, did know that Weatherford was, as a SLED agent, continuing to investigate Bursey after the arrest and until the trial.[39] A. 10. It is difficult to

[38]The findings of the district court are not, of course, entitled to special deference under this Court's "two court" rule "not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous." *Neil v. Biggers*, 409 U.S. 118, 193 n.3 (1972).

[39]The Solicitor General says in his brief that "the court of appeals concluded that there was no evidence of Strom's direct personal supervision of "Weatherford's undercover activities (A. 258)." Brief, at 60, n.40. That is not what the court of appeals said. What the court of appeals actually said was "there is no evidence of Strom's direct personal supervision of *these machinations*," (emphasis supplied) referring–not to Weatherford's undercover activities–but to the sham defendant and phoney attorney ruses. These "machinations" were arranged by Solicitor Foard, although Strom fully concurred in them. That the court of appeals was making a distinction between "machinations" directly supervised by Solicitor Foard and undercover activities is apparent from the next phrase of the court's opinion: "it is clear from his testimony that he [Strom] expected Weatherford to continue working as an undercover agent on the University of South Carolina campus." A. 258, and see A. 222-23.

believe that he did not also know that Weatherford was participating in defense counsels. It is difficult to believe that when Weatherford visited Strom's office every other week to collect his pay, or when he reported to him on the telephone, that the agent and the chief did not discuss Weatherford's biggest case, the only case in which he was ever to testify as a SLED agent.

Strom's disclaimers are not dispositive, however, for this Court has held than an official is liable for misconduct under §1983 "if he knew or reasonably should have known" that his acts would violate constitutional rights. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). It is impossible to conclude that Strom should not reasonably have known that defense contact would occur. Indeed, the very purpose of the co-defendant and retained attorney deception was to facilitate Weatherford's movement around Bursey.[40] In any case, the court of appeals should be deemed correct in ruling that Strom's personal involvement in the violation of Bursey's rights was satisfied by the decisions and actions which he concededly took, and that "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), Strom was liable for the constitutional injury that occurred. A. 263.[41]

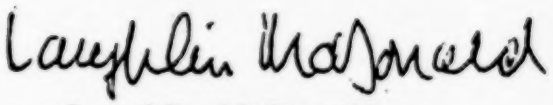
[40]As noted, *supra*, at 66-7, the district court recognized that discussions between Weatherford and Wise about how Taylor was handling his case "was a natural reaction." A. 249.

[41]Although not relied upon by the court of appeals, Strom could be found liable for failing "to take minimal precautions" to insure that his agent would not invade defense counsels or misrepresent the state's case." *Fisher v. Volz*, 496 F.2d 333, 347 (3rd Cir. 1974).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,



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